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No. _____

In The

# Supreme Court of the United States

October Term, 1998

CHAD TRIPLETT, TRACEY TRIPLETT and
GWEN TRIPLETT O'BRIEN,

*Petitioners,*

v.

LIVINGSTON COUNTY BOARD OF EDUCATION,
LEE JONES, MIKE JOINER, TONY LASHER,
DARRELL STAFFORD, PHILLIP THRELKELD,
AND TOM COUNTS,

*Respondents.*

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Kentucky**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a mother and her two children, who were denied graduation and promotion by their school because they refused to take a controversial examination, stated a cause of action under the Family Educational Rights and Privacy Act., 20 U.S.C.A. § 1232(h), and other laws, sufficient to withstand a motion for summary judgment.

## PARTIES TO THE PROCEEDING

The Petitioners are Chad Allen Triplett, Tracey Leigh Triplett and their mother, Gwen Triplett O'Brien. Their father, Phillip Triplett, an original party, died during the pendency of this action, and their mother remarried.

The Respondents are the Livingston County Board of Education, Lee Jones, Mike Joiner, Tony Lasher, Darrell Stafford, Phillip Threlkeld, and Tom Counts.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioners, Chad Triplett, Tracey Triplett and Gwen Triplett O'Brien, respectfully petition as follows for a Writ of Certiorari to review the Order of the Kentucky Supreme Court denying discretionary review dated June 10, 1998 (App. 49).

## OPINIONS BELOW

The Order of the Supreme Court of Kentucky denying discretionary review dated June 10, 1998, is unreported. (App. 49).

The Opinion of the Court of Appeals of Kentucky dated August 15, 1997, is reported at 967 S.W.2d 25. (App. 1-App. 22).

The Order of the Kentucky Court of Appeals denying petition for rehearing dated October 10, 1997, was unreported. (App. 48).

The Findings of Fact, Conclusions of Law, Order and Judgment of the Livingston Circuit Court dated February 20, 1996, and the supplemental Orders dated March 13, 1996, and April 9, 1996, are unreported. (App. 23-App. 47).

## JURISDICTION

The Supreme Court of Kentucky issued its Order denying discretionary review on June 10, 1998. By Order

dated August 27, 1998, this Court granted Petitioners an extension of time until November 7, 1998, in which to file a Petition for Writ of Certiorari. Jurisdiction is invoked under 28 U.S.C. § 1257.

## UNITED STATES CONSTITUTIONAL PROVISIONS

Article 1 § 10: "No State shall pass any . . . ex post facto law."

* * *

Amendment 1: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . . , or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

* * *

Amendment 4: "The right of the people to be secure in their persons, houses, papers, and effects . . . shall not be violated. . . . "

* * *

Amendment 14: " . . . nor shall any State deprive any person of . . . property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## UNITED STATES STATUTES

20 U.S.C. § 1232(h) (App. 51, 52)

20 U.S.C. § 3401(3) (App. 51)

## FEDERAL REGULATIONS

34 C.F.R. 98.4(c)(1) and (2) (App. 60)

## KENTUCKY CONSTITUTIONAL PROVISIONS

§ 2: "Absolute and arbitrary power over the lives, liberty and property of freemen exists no where in a republic, not even in the largest majority."

* * *

§ 5: " . . . Nor shall any person be compelled to send his child to any school to which he may be conscientiously opposed. . . . No human authority shall, in any case whatever, control or interfere with the rights of conscience."

* * *

§ 19: "No ex post facto law . . . shall be enacted."

## KENTUCKY STATUTES

KRS 13A.130(1) (App. 60)

KRS 156.160(1)(c) (App. 60)

KRS 158.140(1) (App. 61)

KRS 158.6453 (App. 61)

KRS 160.290(2) (App. 61)

## KENTUCKY REGULATION

704 KAR 3:305 § 1 (App. 61)

## POLICY

Livingston Co. Bd. Of Ed. Amendment to Policies 8.113 and 8.22 (App. 62)

## STATEMENT OF THE CASE

In 1990, the executive branch of the federal government implemented a federally controlled plan to standardize the nation's educational systems, including "National Assessment Tests" in the fourth, eighth, and twelfth grades to measure students against "world class standards."[1] The goals set forth therein were similar to goals adopted at an international conference earlier that year in Thailand called the World Conference on Education and sponsored by the United Nations and the World

[1] See "World Class Standards," America 2000, An Educational Strategy. (Washington D.C: U.S. Dept. Of Education, 1991), p. 13.

Bank.[2] These standards were an outgrowth of an alliance formed by politicians and businesses alarmed over the educational demise in our country expressed in a 1983 report commissioned by the National Commission on Excellence in Education, entitled *A Nation At Risk,* and educational theorists theretofore unable to sell their wares, but who after being encouraged in the liberal 60's, in the 80's found willing ears in the power brokers fearful of losing their global economic advantages. The theories advocated have been long-rejected by knowledgeable educators as unfounded in truth, violative of individual rights and very plainly not in the interests of our nation, including its economic interests. In the din of emergency, however, these theories have been experimented with in several states over the last few years, with the names of the theories changing, chameleon-like, after public outery from its dismal failures. It has been called "Mastery Learning, Outcome Based Instruction, Outcomes Driven Developmental Model, OBE, or something else. Kentucky's 'something else' is Performance-Based Education – the same name used in the Goals 2000: Educate America Act."[3] There are several exposés on the sad consequences of these experiments.[4] The theories gained entrance to

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[2] *Outcome-Based Education, The State's Assault on Our Children's Values,* Peg Luksik and Pamela Hobbs Hoffecker, 1995, Huntington House Publishers, p. 98.

[3] Luksik, supra, p. 45.

[4] Luksik, supra.

*OBE, Understanding the Truth about Education Reform,* Ron Sunseri, Multnomah Books, Sisters, Oregon 1994.

Kentucky after the Kentucky Supreme Court, being unable to specify any portion of its educational system that was unconstitutional, simply declared the entire system unconstitutional. *Rose v. Council for Better Education,* 709 S.W.2d 186 (Ky. 1989).

*Rose* created a state constitutional right to an education and mandated that the legislature craft a new system along certain lines set out in the opinion.

Kentucky's General Assembly, with advice from outside experts who had been waiting in the wings, then passed the Kentucky Educational Reform Act (KERA). Kentucky Revised Statutes (KRS) 158.645, et seq., effective July 1990. In KRS 158.6453 the legislature instructed the Kentucky Department of Education (KDE) to reconstruct the system, including the creation and implementation of "a statewide, primarily performance-based

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*Dumbing Us Down, The Hidden Curriculum of Compulsory Schooling,* John Taylor Gatto, New Society Publishers, 1992.

*Government Nannies, The Cradle-To-Grave Agenda of Goals 2000 & Outcome Based Education,* Cathy Duffy, Noble Publishing Associates, P.O. Box 2250, Gresham, Oregon 97030 (1995).

*Real Choice, Real Freedom in American Education,* Kerry L. Morgan, University Press of America, Inc., 1997.

*America Betrayed,* by Marlin Maddoux, Huntington House, Inc., 1984.

*The Family Under Seige, What the New Social Engineers Have in Mind for You and Your Children,* by George Grant, Bethany Home Publications, 1994.

*The Things That Matter Most,* Cal Thomas, Harper Collins, 1994, Chapter 8, *The Promise of Progressive Educations.*

assessment program to ensure school accountability for student achievement of the goals set forth in KRS 158.645." (App. 61) The goals of KRS 158.645 (App. 50), include provisions that "parents . . . must assist the schools" and that the schools will teach and test the children with regard to their "mental wellness" and "political choices." KERA provided for KDE to "contract" with "authorities in the field of performance assessment." KRS 158.6453(2). KDE contracted with such an "authority" in New Hampshire, and, among other things, the Kentucky Instructional Results Information System (KIRIS) assessment tests for grades four, eight and twelve were created. Although each school is tested on all students, state law does not require that all students have to take the test and there is no provision in state law for sanctions against students not taking it.

When the 1993-1994 school year commenced in Livingston County, Kentucky, Chad Triplett, a senior, and his sister, Tracey Triplett, an eighth grader, had a good school history, with every expectation of doing well that year.

Chad and Tracey and their parents, Gwen and Phillip (who died during the pendency of this case), (the Tripletts), decided not to participate in the KIRIS tests, and notified the school in January of 1994. (Record on Appeal [RA], 120, 121, 177). They were then told that participation was mandatory. Shortly thereafter the local school was advised by KDE that the laws "do not mandate the participation of students in the assessment process," but that the KDE would "hold schools accountable for the performance of all students and in the absence of KIRIS assessment information about the performance of a child, the school will be assigned a novice level performance for

that child." (RA 85, 86). KDE said the Tripletts' request to opt-out was "equivalent to requesting an exemption from significant portions of the curriculum." Id. Not wanting to miss out on the possible financial rewards or suffer sanctions under KERA, the Livingston County Board of Education (School) passed the following policy on February 14, 1994, in the middle of the school year:

> "Students shall complete all parts of KIRIS assessment before advancing to the next grade or graduating, including math and writing portfolios." (RA 122).

Mrs. Triplett sought to examine the test and the scoring rubrics. She was allowed a cursory review but she was not allowed to photocopy or take notes. She did not get to review all of the rubrics and perhaps not the exact test given, but rather samples. The tests were objectionable to the Tripletts.

The students did not take the test as scheduled. However, Chad had previously participated in the writing portfolio portion of the KIRIS assessment, with no opportunity for prior parental inspection, and these were a part of his file. His school record (RA 418-430) reflects, in part, the following:

- waiver of rights signed by Chad for others to look at his work. (RA 419).
- poem by Chad about his fears, feelings and needs. (RA 422).
- essay by Chad in which he was asked to pretend he was President and to come up "with ideas to help our economy," which will reflect his political belief. (RA 423).

- Christmas time essay, which would be expected to reflect whether he is a Christian, and it did. (RA 425).[5]

- Comments by Chad in which he was asked to state how he felt about the nature of the assessment: "The only problem I had with writing, the paper of my personal narrative. I don't like writing about me and my experiences. I have real trouble writing about my experiences, because I don't like people prying into my personal life knowing how I think or feel." (RA 426).

As a result of their decision not to participate, Chad and Tracey were harassed and intimidated by school officials. (RA 123). A few students at their school and at other schools in Kentucky were later allowed to opt-out without sanctions. (RA 177, 228, 229, 404-407). Finally, although they had completed all necessary requirements, the school refused to graduate Chad or promote Tracey, solely because they refused to take the test. They were also stigmatized with a "novice rating." (RA 233).

This suit followed. The school filed for summary judgment. Little discovery occurred. The Tripletts sought to discover the tests. The school objected on grounds that the tests were in Frankfort and were secret under state law. Finally, the Court ordered that the test be produced for review by the Tripletts, but only in the Court's chambers under eye of a Commissioner, who had charge of their security, with a prohibition against photocopying,

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[5] The trial court stated that the record did not reflect their religious faith. (App. 29). However, the Petition, Paragraph 7, states they are Christians. (RA 3).

notetaking or disclosing the contents to others for their opinion, and with directions to merely list the questions that were objectionable. (RA 98, 99, 102, 156, 157). The Tripletts sought to discover the scoring rubrics, as they become part of the content of the curriculum since they are taught by teachers, and they are further evidence of the lack of academic content, the social engineering goals as to attitudes and beliefs, and the subjective and arbitrary nature of the grading process. (RA 363). Although the Court initially ordered their production (RA 756), the school refused to produce the scoring rubrics, claiming that: they could not get the rubrics from KDE in Frankfort because they were in New Hampshire at Advance Systems (the "contractor" with KDE), where the tests were graded, and Advanced Systems would not release them (RA 764-771); the rubrics were too voluminous, " . . . there might be between 5,376 and 10,752 pages" of scoring rubrics for just the two grades, eight and twelve (RA 767); and because there is also a "training and feedback process" between the scorers and leaders that figured into the scoring of the tests, and there were group leaders that supervised the grading. (RA 767, 768). In other words, there was no way to produce this subjective aspect of the process. An affidavit was filed by two teachers, who said: " . . . Because the scoring takes place out of state, how open response items have been scored has remained a mystery to most Kentucky educators." (RA 769). The Court finally denied discovery of the rubrics, finding them irrelevant because the tests were not actually taken and because, in the Court's opinion, the tests' primary purpose is to grade the schools rather

than the students. (RA 1289). The scoring rubrics have remained hidden in New Hampshire.

In Response to the Motion for Summary Judgment, the Tripletts presented the following:

- The tests.

- Chad's school records, above described.

- An affidavit of Dr. George K. Cunningham, Ph.D., a professor and author of college textbooks on testing, who has studied it extensively and says the KIRIS exams lack content validity and are not reliable. (App. 56-59).

- An affidavit of Renee Kelley, a school teacher, with a masters in education, who has studied it extensively and who verified objections to the test saying it is secretive, arbitrary and contains messages of a psychological conditioning nature, seeking politically correct answers rather than testing academics. (RA 130-132, App. 53-55).

- An affidavit of Steven D. White, Ph.D., CPA, a professor, who has studied KIRIS extensively and shared an opinion with many other educators that the test is arbitrary, lacking reliability, and full of bias toward "politically correct extremes" instead of education. He also noted that "the scoring rubric (that's the grading suggestions) is not created until all of the questions have been read by the testing company ASME. This is the equivalent of having a pitcher throw a pitch and then the umpire decides what a strike is." (RA 127-129).

- Documents from the KIRIS assessment to prove that psychological testing occurs, including the following: "Systematic Screening For Behavior Disorders" . . . "to

identify pupils at risk for emotional or behavioral disorders" to be used "within the KIRIS Assessment Scoring Process" to "systematically evaluate all pupils in their classes in terms of the extent to which they may be at risk for externalizing (i.e. acting out) or internalizing (i.e., withdrawal) behavior disorders." An "Alert Paper" is any paper which leads the reader to suspect that the writer has indicated, "directly or indirectly, that he/she is dealing with one of the following problems: abuse, depression, suicide or violence against another person." All persons involved with the scoring process are directed to look for indications in the "assessments" and "portfolios" for "any document containing evidence that a child may be dependent, neglected or abused." (RA 136-142). The school admitted the psychological testing but said it is a "further service to the students and citizens of this State." (RA 173).

– A 308 page document entitled, *A Report for the Office of Educational Accountability, Kentucky General Assembly*, by six nationally known education experts, (Volumes IV and V of the Record on Appeal; RA 445-753), in which this experimental test was found to be "seriously flawed." Specifically the panel found that:

> – " . . . as a result of the serious measurement flaws, the public is being misinformed about the extent to which student achievement has improved statewide and the public is being misled by being given information about the accomplishments that may be misleading." (RA 445).
>
> – "The setting of performance standards was seriously flawed . . . the Panel considers the performance standards used to classify students

as Novice, Apprentice, Proficient and Advanced to be untrustworthy. This makes the information provided to parents and others about student performance potentially misleading." (RA 451).

– " . . . The panel has found significant deviations from legal and professional standards in the KIRIS assessments and recommends significant changes in the operation of the assessment system." (RA 717).

– The panel acknowledged and discussed the validity of parental and student legal challenges on the basis of religious freedom and the right to inspect the tests. (RA 735-744).

– 97% of the twelve Reading Forms for the 12th grade in 1993-1994 contained "controversial topics for which members of different religious and ethnic groups have strongly held views." (RA 740).

– " . . . the question of importance to parents challenging the content of KIRIS might be paraphrased as: 'Is there a state-sponsored message in the assessment selections which attempts to influence a student's beliefs." (RA 740).

– "It appears that KIRIS selections are pro-multiculturalism, pro-women's rights and non-traditional roles, pro-animal rights, pro-healthy diet and exercise, pro-consumer rights and pro-environment. . . . " (RA 740).

– "The following concerns were raised by some members of a statewide Sensitivity Review Committee which issued a report in 1994:

- Taken as a whole, the test favors a liberal viewpoint.

- Many questions appear to seek a politically correct response.
- There is a lack of patriotic and/or traditional literature used on the assessment.
- Religion is often cast in a negative light.
- Multiculturalism is over emphasized.
- Environmental issues are addressed in Science, Vocational Studies/Practical Living, and Social Studies with preference given to the environmentalist viewpoint.
- The feminist viewpoint is given preference over traditionalist views. KIRIS Review Committee Report, June 29, 1994, p. 1-2" (RA 743).

– "Passages for Reading Open-Response Questions" entitled "Your Dad's A Wimp." (RA 145).

– A letter dated March 16, 1994 from KDE taking the position that: "This assessment process is seen as a part of the *curriculum* and the *learning* process of students." (RA 90). (emphasis added). The school admitted that the students were tutored before taking the test. (RA 224). In this high stakes environment, with rewards and sanctions, the teachers "teach to the test" and neglect traditional scholarship.

Petitioners pled and argued the following issues:

1. Kentucky law provides that a person shall receive a diploma upon completion of the state and local requirements. KRS 158.140(1) and (2). (App. 61) KRS 156.160(1)(c) requires the KDE to set forth the minimum requirements

prior to each year. (App. 60) 704 KAR 3:305 sets forth those requirements. (App. 61) KRS 160.290(2) requires that a school board's policies "shall be consistent with the general school laws of the state." (App. 61) KRS 13A.130 provides that a policy may not modify or expound a regulation. (App. 60) Although each school is tested on "all" students, state law does not require all students to take the test and there is no sanction provided in state law for not taking it. The policy of the school board, adopted in the middle of the year, which expanded the requirements of 704 KAR 3:305, is thus void under state law and is void as an ex post facto law under the United States Constitution, Article 1 § 10 and the Fourteenth Amendment and the Kentucky Constitution, § 19 (Petition, RA 7, 8; Responses to Motion, RA 111; Appellants' Brief, p. 19; Motion for Review, p. 4, 8). If given notice of this new requirement prior to the school year, the Tripletts could have chosen a private school. Even though there is no precedent for recognizing an education itself as a fundamental right, as *Rose* the Council for Better Education, supra, held, the federal courts have recognized an individual substantial property right in the education of an individual to the extent it has been, or is being, earned. *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fl., 1979), *aff'd in part, rev'd in part*, 644 F.2d 397 (5th Cir., 1981), *on remand*, 564 F.Supp. 177 (M.D. Fl., 1983), *aff'd*, 730 F.2d 1405 (11th Cir., 1984).

2. KERA and the KIRIS tests violate the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C.A. § 1232(h), because the tests are experimental and: (a) they were denied a full examination of the test and scoring rubrics; (b) KERA, on its face violates FERPA as it

expresses an intent to subordinate parents to the schools and teach and grade political choices and mental health; and (c) the KIRIS exam includes religious, political and mental health instruction and evaluation without prior written consent of the parents. (Petition, RA 12, 13; Responses to Motion for Summary Judgment, RA 113, 114, 364, 370; Appellant's Brief, p. 6, 22, 23; Petition for Rehearing, p. 1-6; Motion for Discretionary Review, p. 4, 9, 10, 11).

3. The contents and grading of the tests invades family privacy, establishes a religious or moral code in opposition to the family, discriminates on the basis of religion, and infringes on their right of free speech by compelling students to speak against their wishes by selecting morally objectionable responses in violation of the United States Constitution, Amendments One, Four and Fourteen, and the Kentucky Constitution, § 5. (Petition, RA 9-13; Responses to Motion, RA 111-115, 363-365; Appellant's Brief, p. 20, 21; Motion for Review, p. 5, 9).

The school staff is sanctioned if students do not conform to the subjective beliefs of Advanced Systems. Therefore, the teachers teach to the test, even though it replaces the normal scholastic curriculum. Students are goaded to conform their attitudes and beliefs to the tests, which are not graded by their teachers, but by people outside the state. The court opinion said KERA de-centralized education. Perhaps on its face, but in theory and practice it is a divide and conquer scheme which will result in stronger centralized government schools. This fiasco has caused many mature, capable teachers to resign in disgust. The OEA Report by six national experts said the tests contained a "state-sponsored message

which attempts to influence student beliefs" and "seek a politically correct response" in the areas of religion, politics and private family matters. Thus, the Act adopts as state educational policy transformational outcomes based education, the centerpiece of which is to require affective behavior responsive to change. It transforms Kentucky's public education system from one of compulsory attendance affording students an opportunity to learn to one of compulsory learning. This is constitutionally impermissible under the *First Amendment* as applied to the States. *West Virginia v. Barnette,* 319 U.S. 624, 87 L.Ed. 1628 (1943). The *First Amendment* prohibits state policy that discriminates against the content of a person's message and "student writings" cannot be required to "meet some baseline standard of secular decency." It is "presumed to be unconstitutional." *Rosenberger v. Virginia,* 515 U.S. ___, 115 S.Ct. 2510, 132 L.Ed.2d 700, 715 (1995). In another case, *Tinker v. Des Moines Indep. Comm. School Dist.,* 393 U.S. 503, 21 L.Ed.2d 731 (1969), the Court held:

> "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the state wishes to communicate." 393 U.S. 506
>
> . . .
>
> "It can hardly be argued that either students (and) teachers (do not) shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

393 U.S. 506

4. The tests are over broad, lacking content credibility and statistical reliability, measuring neither a student's or school's scholastic or academic performance accurately and are arbitrary, denying the petitioners due process and equal protection of the laws, under the United States Constitution, Amendment Fourteen and the Kentucky Constitution, § 2. (Petition, RA 11; Response to Motion, RA 115; Appellant's Brief, p. 20, 21; Motion for Review, p. 5). The teacher, Mrs. Kelley, and the trial court, said that there were no right or wrong answers. (App. 34, 55). Where psychological testing occurs or where students are labeled as a result of a test, the burden is on the school to prove that the margin of error is "almost nil." *Merriken v. Cressman*, 364 F.Supp. 913 (E.D., PA, 1973). *Parhan v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979).

5. The tests do not measure or enhance academic performance or instill discipline, there were less restrictive alternatives, and the school did not make reasonable accommodation. (Petition, RA 10; Appellant's Brief, p. 6, 21; Motion for Discretionary Review, p. 5).

6. They were denied equal protection of the laws when other students were allowed to opt-out without penalty, in violation of the United States Constitution, Amendment Fourteen, and the Kentucky Constitution, § 2. (Response to Motion, RA 115; Appellant's Brief, p. 20; Motion for Review, p. 11).

7. The Tripletts were denied notice/hearing upon refusal to promote and graduate. (Petition, RA 9; Response to Motion, RA 114; Petition for Rehearing, p. 3;

Appellant's Brief, p. 5; Motion for Discretionary Review, p. 5). *Debra P. v. Turlington*, supra.

The Tripletts argued that under Kentucky law, summary judgment is not a substitute for trial. It should be granted only with great caution, all inferences should be made in their favor, and if petitioners may be able to make a case on any plausible theory, it is inappropriate. It should only be granted if it appears impossible for the non-movant to produce any evidence at trial warranting judgment in his favor. *Puckett v. Elsner*, 303 S.W.2d 250 (Ky. 1957). *Rowland v. Miller's Admin.*, 307 S.W.2d 3 (Ky. 1957). *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). *Steelvest Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). (Response to Motion, RA 116; Appellant's Brief, p. 14, 24; Motion for Review, p. 11).

The trial court held that educational experts were of no use, that the issues presented were "all political questions which must be dealt with by the legislature," and granted a summary judgment dismissing the petition. (App. 23-44). Although the court had denied the Tripletts full discovery of the tests and rubrics, it found a "public's right to know" and ordered the KIRIS exams (without the rubrics) to be available for public inspection in the clerk's office where, although no photocopying was allowed because of inconvenience to the clerk, presumably notes could be taken by the public. (App. 45-47).

On appeal, the Kentucky Court of Appeals found that the issues raised were without merit and affirmed. (App. 1-22). The court said that experts were of no help to the court (App. 8), and that the tests were primarily for testing the schools rather than the students. (App. 4, 22).

However, they did reverse in part, finding that the trial judge abused his discretion by making the tests available for public inspection. (App. 19-22).

The Supreme Court of Kentucky denied discretionary review on June 10, 1998. (App. 49). On August 27, 1998, this Court granted an extension of time to November 7, 1998 to file this petition.

## REASONS FOR GRANTING THE WRIT

"Former educator and U.S. Senator, Samuel I. Hayakawa, warned the United States Senate in 1978 that schools had become vehicles for a 'heresy that rejects the idea of education as the acquisition of knowledge and skills' and instead 'regards the fundamental task in education as therapy.' "[6] "He said that such inquiring into attitudes, beliefs, and emotional problems is a 'serious invasion of privacy.' " *Id.*, Schlafly, p. 13.

The courts below reasoned that the test did not affect the students; because the *primary* purpose of the test was to grade the schools not the students. However, an included purpose, whether primary or secondary (and some opine it is primary) is to evaluate students and as a result they are recognized, rewarded, labeled and stigmatized. It matters not whether it is a stated primary

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[6] *Faith and Freedom*, Matthew D. Staver, Crossway Books, Wheaton, Il., 1995, p. 69, quoting from *Child Abuse in the Classroom, Excerpts from Official Transcripts of Proceedings before the U.S. Department of Education*, Phyllis Schlafly, Editor, Crossway Books, Wheaton, Il., (1995), p. 13.

purpose or a stated secondary purpose; what matters is what actually occurs, and the ploy of the state in focusing on self-evaluation of the schools, as compared to the students does not exempt them from the applicable federal law and should not affect a court's scrutiny. Because of the high-stakes environment, including rewards and sanctions to the teachers and administrators, the teachers "teach to the test" and it becomes a part of the curriculum. This was admitted by the KDE in its memorandums and affidavit discussed above. (RA 90, 224). Not only does the test become a part of the curriculum influencing the students' actual education, but the results go into the school record of the students and follow them after graduation to college and to their prospective employment. Because of the arbitrariness of the grading, the full extent of which is unknown because of a lack of discovery, there is a great risk of stigmatization of bright students because of a dumb test. FERPA, 20 U.S.C. § 1232(h) (App. 51-52), requires that all instructional material used in any new or unproven teaching method or technique be made available for inspection by parents. There is no question but what this technique is new and unproven. In fact, the methods being implemented in Kentucky are considerably more novel than many of the previous experiments. It is reported that U.S. Secretary of Education Riley called Kentucky a " 'lighthouse of reform' for the rest of the nation."[7] The false propaganda lauding the alleged success of this secretive project is astonishing. The KERA legislation, KRS 158.645 (App. 50), on its face, violates 20 U.S.C.A. § 3401(3) (App. 51). This federal law says that

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[7] Luksik, supra, p. 41, 42.

parents have the primary responsibility for the education of their children and that the states, localities and private institutions have the primary responsibility for supporting the parental role. The Kentucky statute subordinates the parents to the school.

The above KERA legislation also, on its face, violates FERPA insofar as it establishes a law to teach and test on "political choices" and "mental wellness."

The KIRIS assessment implemented by the KDE actually tests attitudes, religious beliefs, mental health and political affiliations in violation of FERPA (App. 51-52). In an effort to clarify the meaning of psychiatric or psychological examination, testing and treatment, the United States Department of Education developed guidelines which define examination or testing as "a method of obtaining information about attitudes, habits, traits, opinions, beliefs or feelings." 34 C.F.R. 98.4(c)(1). Treatment means "an activity involving the planned, systematic use of methods or techniques that are not directly related to academic instruction and that is designed to affect behavioral, emotional, or attitudinal characteristics of an individual or group." 34 C.F.R. 98.4(c)(2). The writing portfolio of Chad Triplett clearly elicited such information about attitudes, habits, traits, opinions, beliefs and feelings. The Tripletts allege, and supported their allegation with expert opinion, that the test and scoring rubrics affected their First Amendment rights. It is impossible to evaluate the degree to which students' protected opinions and beliefs are influenced and graded without discovery of, and comment on, the scoring rubrics. The constitutional right to petition the government runs along with the right to assemble, which includes the right "to listen,

observe, and learn." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). In *Steier by Steier v. Bethlehem Area School Dist.*, 989 F.2d 989, 994 (3rd Cir., 1993), the court said:

> "On the other hand, we do not accept the suggestion made by defendants at oral argument that once the educational purpose of the Program is established, the Program is ipso facto constitutional. Even 'teaching values' must conform to constitutional standards. The constitutional line is crossed when, instead of merely teaching, the educators demand that students express agreement with the educators' values."

And, at p. 993, the *Steier* court quoted from *Wooley v. Maynard*, 430 U.S. 705 (1977), which states:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

In order to petition the government, the people must be informed and have counsel. They need unfettered ability to examine the test and rubrics and discuss them openly and freely with teachers, family, psychologists, pastors, friends and others. Senator Kemp said that, "The purpose (of FERPA) is to assure that no child should be subject to untried teaching methods or techniques." 120 Cong. Rec. 8505 (1970). Thus, inquiry into the teaching techniques (preparatory tutoring, which the students received) and the instructional materials (the tests and rubrics, which they say is a part of the curriculum and which the teachers teach to) is necessary. Testimony from experts in

the field of education can assist in recognizing non-scientific, non-academic, subjective schooling and grading. Any state law providing for secrecy is pre-empted by federal law. The Grassley Amendment to FERPA, following the Hatch Amendment, and which was effective March 31, 1994, expanded application of FERPA to all instruction and education, not only experimental and unproven methods. The Tripletts last refused the tests on May 24, 1994 (RA 56), so whether the tests were experimental and unproven or not, and they were, the parents had the right to fully inspect the whole scheme and withhold their children's participation.

Of course, FERPA and the parental rights statute, 20 U.S.C.A. § 3401(3), are merely codification of the rights of students and parents long-recognized in our common law and cited in the Petitioner's pleadings in the state court.[8] In many of these and other cases, experts were used. Books and reports were also admitted into evidence in some of those cases.[9]

It has been held that " . . . conduct by persons acting under color of state law which is wrongful under § 1983 cannot be immunized by state law even though a federal cause of action is being asserted in state court." *Howlett v.*

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[8] *Marrow v. Wood*, 35 Wis. 59 (1874); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977); *Santosky v. Kramer*, 455 U.S. 745 (1982).

[9] *Merriken*, supra; *Parham*, supra; *Smith Organization of Foster Families* (court considered law review articles and books), supra; and, *Debra P.*, supra.

*Rose*, 496 U.S. 356, 110 S.Ct. 2430, 1110 L.Ed.2d 332 (1990) at 243. The Kentucky Courts have ignored the United States Constitution and the laws of our Congress, especially FERPA, an important federal statute. This is an issue that has not been, but should be, settled by this Court. Further the state court decision is in conflict with relevant decisions of this Court regarding education and families. Either the public school systems are going to be held accountable for violation of students' and parents' rights or the citizenry can quit wasting time on the public schools and concentrate on private schools or home-schooling. Still further, for the sake of the nation's economic future, this educational experiment invites review and correction.

## CONCLUSION

For the reasons stated above the Court is respectfully requested to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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**Commonwealth of Kentucky**

**Court Of Appeals**

NO. 96-CA-1046-MR

CHAD TRIPLETT: TRACEY TRIPLETT; PHILLIP TRIPLETT; AND GWEN TRIPLETT — APPELLANTS

APPEAL FROM LIVINGSTON CIRCUIT COURT
v. HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 94-CI-62

LIVINGSTON COUNTY BOARD OF EDUCATION; LEE JONES; MIKE JOINER; TONY LASHER; DARRELL STAFFORD; PHILLIP THRELKELD; TIM PORTER; AND TOM COUNTS — APPELLEES

AND NO. 96-CA-1371-MR

LIVINGSTON COUNTY BOARD OF EDUCATION; LEE JONES; MIKE JOINER; TONY LASHER; DARRELL STAFFORD; PHILLIP THRELKELD; TIM PORTER; AND TOM COUNTS — APPELLANTS

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OPINION
AFFIRMING IN PART
AND REVERSING AND REMANDING IN PART

* * *

BEFORE: COMBS, DYCHE, AND SCHRODER, JUDGES.

SCHRODER, Judge. This is an appeal from a judgment declaring that the Kentucky Instructional Results Information System ("KIRIS") assessment exam and the requirement to take said exam are not in violation of parents' or students' constitutional rights, nor in violation of certain federal laws. This is also an appeal by the school from a ruling mandating that the KIRIS assessment exam shall be open for public review. We affirm the court's decision regarding the constitutionality of the exam and the requirement to take the exam, reverse the open records order, and remand for proceedings consistent with this opinion.

In response to the Kentucky Supreme Court's ruling in *Rose v. Council for Better Education, Inc., Ky.*, 790 S.W.2d 186 (1989), the Kentucky General Assembly enacted the Kentucky Education Reform Act ("KERA"), effective July 13, 1990, which mandated that the Kentucky Board of Education ("KBE") develop a system of public education whereby state government, local committees, parents, students and school employees would share the responsibility of improving public education in Kentucky. Part of KERA mandates that the KBE create and implement "a statewide, primarily performance-based assessment program to ensure school accountability for student achievement of the goals set forth in KRS 158.645." KRS 158.6453.

The goals in KRS 158.645, which codified those set forth in *Rose, supra* at 212 are:

(1) Communication skills necessary to function in a complex and changing civilization;

(2) Knowledge to make economic, social, and political choices;

(3) Understanding of governmental processes as they affect the community, the state, and the nation;

(4) Sufficient self-knowledge and knowledge of his mental and physical wellness;

(5) Sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;

(6) Sufficient preparation to choose and pursue his life's work intelligently; and

(7) Skills to enable him to compete favorably with other students in other states.

KRS 158.6453 required that an interim assessment test be given to students in grades 4, 8 and 12 by the 1991-1992 school year and that the permanent assessment program be implemented no later than the 1995-1996 school year.

In establishing the assessment program, KERA provided for the KBE to contract with authorities in the field of performance-based assessment. The KBE contracted with such authority in New Hampshire and ultimately created the Kentucky Instructional Results Information System ("KIRIS") assessment exam which assesses student skills in reading, mathematics, writing, science and social studies.

The primary purpose of the KIRIS test is not for evaluating individual student performance, but for evaluating the progress of the school systems under KERA. Performance levels of Novice (being the lowest), Apprentice, Proficient and Distinguished were established in evaluating the KIRIS exam results. Each of these performance levels was given a rating from 0 points for the Novice, to 140 points for the Distinguished. Through a fairly complicated formula, the grades of the individuals tested are computed into an overall school rating. The testing provides both cognitive (academic) and non-cognitive (dropout rates, attendance, retention rates, etc.) data which come together first to form a baseline score. Once the scores are established, thresholds, or goals, are established for each school to meet. If the school exceeds the threshold by one point and moves ten percent or more of its students out of the "Novice" level, it is considered successful and qualifies for rewards. Schools that improved, but did not meet their goals must develop improvement plans and work to raise their levels of achievement. For those schools in crisis whose scores drop below their baseline, assistance is made available.

Simply put, those school districts where students do well on the KIRIS test are rewarded, and those school districts where students do poorly are penalized. The law provides for sanctions to be imposed upon those in crisis (staff placed on probation), and financial rewards are given to those districts that are successful. KRS 158.6455. Therefore, each school district in this state has a financial interest in the outcome of the test scores of KIRIS examinations given within its district.

Early in 1994, prior to the KIRIS assessment tests' being administered in the spring, the parents of Chad Triplett, a senior, and Tracey Triplett, an eighth-grader (hereinafter "the Tripletts") informed the Livingston County School System (hereinafter "the school") that they did not want their children to take the KIRIS assessment test. When the 1993-1994 school year commenced, the Livingston County schools had no policy requiring students to take the KIRIS tests. Thus, at first, the Tripletts were told by the school that their children would not be required to take the KIRIS test. Subsequently, however, the KBE informed the Livingston County school system that it would hold all schools accountable for the performance of all students and, in the absence of KIRIS assessment information about the performance of a child, the school would be assigned a novice level performance for that child. Consequently, on February 14, 1994, the Livingston County Board of Education passed the following policy:

> Students shall complete all parts of KIRIS assessment before advancing to the next grade or graduating, including math and writing portfolios.

Prior to the tests' being given, Mrs. Triplett requested to review the tests, and on February 16 and February 18, 1994, she was allowed to examine them. There is some question as to how much of the actual tests she was allowed to examine and how long she was given to review the tests. She was not allowed to take any notes or make copies.

Based primarily on religious objections to the tests, the Tripletts refused to let Chad and Tracey take the

KIRIS assessment test in 1994. As a result of their not taking the test, the Livingston County School Board refused to allow Chad to graduate and Tracey to be promoted to the ninth grade, although Chad and Tracey had completed all other necessary requirements for graduation and promotion, respectively.

On May 25, 1994, the Tripletts filed the action herein against the Livingston County Board of Education, seeking a permanent injunction to prevent the school board from excluding Chad from graduation and a declaratory judgment establishing that Chad and Tracey had fulfilled all requirements for graduation and promotion, respectively. The petition for declaratory judgment also requested that the court rule regarding the Tripletts' claims of violation of privacy, infringement of their exercise of religion, interference with their parental rights, denial of their due process rights and their rights under certain federal laws.

Both parties filed various affidavits in support of their positions, including some from educational experts giving their opinions regarding the merits or lack thereof of the KIRIS assessment test. Additionally, the Tripletts filed a request for production of the KIRIS assessment test for review in preparation for trial. The court ordered that the test be delivered by the school to a Special Commissioner who would monitor the review by the Tripletts and their counsel.

Subsequently, the school made a motion for summary judgment. On February 22, 1996, the circuit court granted the school's motion and dismissed the Tripletts' petition.

The court noted that since the petition was for declaratory judgment seeking a permanent injunction, it was an equitable action in which the court must decide both issues of law and fact.

In the court's 21-page opinion and order, the court reviewed the KIRIS exam questions in the record in light of the specific objections raised by the Tripletts, and found that the Tripletts' claims had no merit:

> The Court finds nothing in the examination questions which either interferes with the parental rights or the control in the upbringing of the children, infringes upon the free exercise of religion nor the establishment thereof, nor violates any of the rights under the Family Educational Rights and Privacy Act, nor their right to privacy. While the KIRIS assessment procedure as well as KERA itself may be subject to political debate, the implementation of that law has already been held to be legitimate and is not an exercise of arbitrary power in violation of Section Two of the Kentucky Constitution. (See *Chapman v. Gorman*, 839 S.W.2d 232 (1992)).

The court went on to conclude that it was not unconstitutional to require all students to take the KIRIS exam. The court did, however, agree with the Tripletts' argument as to their right to review the KIRIS exam questions. The court ruled that the KIRIS exam should be made open for review by the public. In a subsequent order the court expanded its earlier ruling to allow the KIRIS exam to be viewed by the public at the Livingston County Circuit Clerk's office. From the February 22, 1996 judgment, the Tripletts now appeal the ruling regarding the constitutionality of the KIRIS exam and the requirement to take

the KIRIS exam, while the school appeals from the rulings allowing the KIRIS exam to be made open for public viewing.

We first address the Tripletts' argument that summary judgment was premature in this case because material questions of fact existed. They specifically point to the affidavits of the various experts in the record containing opposing views on the KIRIS assessment exam. The Tripletts also maintain that they will present other evidence discrediting the KIRIS exam if the action is allowed to proceed.

Summary judgment should be used to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting judgment in his favor and against the movant. *Steelvest, Inc. v. Scansteel Service Center, Inc., Ky.*, 807 S.W.2d 476 (1991). The function of a motion for summary judgment is to secure final judgment as a matter of law when there is no genuine issue of material fact. *Conley v. Hall, Ky.*, 395 S.W.2d 575 (1965). We would agree with the lower court that the issues in the present case are matters of law, not fact. While the determination of the constitutionality of the KIRIS exam may involve factual matters, the ultimate decision is one of law. In a similar case challenging a Louisiana act requiring the teaching of creationism, the United States Supreme Court found that summary judgment was proper, even in the face of uncontroverted affidavits submitted by the respondent. *Edwards v. Aguillard*, 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987). We believe the present case

was proper for summary judgment since the record contained everything necessary for the court to decide the issues of law, which we shall now address.

The Tripletts argue that when the Livingston County Board of Education passed the policy requiring that all students take the KIRIS exam mid-year in the school year (February), it failed to provide them with adequate notice of the requirement and, thus, operated as an ex post facto law. We believe this argument is without merit. The passage of the KIRIS exam requirement did not punish any action that had already been taken by the Tripletts and did not serve to prejudice the Tripletts in any way. The KIRIS exam requires no advance preparation beyond the student's normal academic program; hence, further notice would have served no purpose.

The Tripletts also argue that the local school board did not have legal authority to require that all students take the KIRIS exam. Although there is nothing in KRS 158.6453 (the statute mandating that the Kentucky Board of Education create and implement an assessment program) specifically requiring that all students must take the assessment exam, we believe statutory authority exists for the local board of education to establish such a policy. KRS 156.160(1)(c) allows the KBE to promulgate regulations regarding the minimum requirements for high school graduation and requires that the KBE review the graduation requirements in light of the expected outcomes for students and schools set forth in KRS 158.6451. 704 KAR 3:305 § 3(1) & (2) provides:

> (1) Each student who satisfactorily completes the requirements of this administrative regulation and such credits and additional

> requirements as may be imposed by a local board of education shall be awarded a graduation diploma.
>
> (2) Local boards of education may grant different diplomas to those students who complete credits above the minimum number of credits as established by the State Board for Elementary and Secondary Education.

The above regulation permits local boards to establish additional graduation requirements above the minimum requirements set forth by the KBE. Indeed, the concept of decentralization of schools is a large part of KERA. The individual schools are responsible for their own performance on the KIRIS assessment exams and there is much at stake for the individual schools in terms of rewards and penalties. *See* KRS 158.6455. Therefore, each school district should have the authority to set policy which relates to the assessment process so long as it does not conflict with KERA or the responsibilities delegated solely to the KBE by KERA.

We next move on to the Tripletts' primary claim that requiring the Triplett children to take the KIRIS assessment exam violates: their constitutional right to free exercise of religion; their constitutional right as parents to direct the education and upbringing of their children, *see Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972); and the Hatch Amendment to the Family Educational Rights and Privacy Act, 20 USCA § 1232 (Hatch Amendment). The thrust of the Tripletts' claim is that the content of the KIRIS exam questions offends their religious beliefs because the test: establishes a religious or moral code; invades the students' religious and moral

beliefs; discriminates on the basis of religion; and compels the students to speak against their beliefs by selecting morally objectionable responses.

We shall first address the Tripletts' allegation that the KIRIS exam violates 20 USCA § 1232h(b) of the Hatch Amendment which provides as follows:

> No student shall be required, as part of any applicable program, to submit to a survey, analysis, or evaluation that reveals information concerning –
>
> (1) political affiliations;
>
> (2) mental and psychological problems potentially embarrassing to the student or his family;
>
> (3) sex behavior and attitudes;
>
> (4) illegal, anti-social, self-incriminating and demeaning behavior;
>
> (5) critical appraisals of other individuals with whom respondents have close family relationships;
>
> (6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers; or
>
> (7) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program),
>
> without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.

We find there is nothing in the exam which compels a student to reveal any type of information listed in 20 USCA § 1232h(b). A portion of the exam does include a multiple-choice student questionnaire in which the student is asked to give certain factual information about himself or herself, such as how much time he or she spends on homework each day and whether he or she attended kindergarten, but the questionnaire is prefaced by the caveat that if he or she does not feel comfortable answering any question, he or she may leave it blank. Also, certain essay questions ask that the child view a situation from his or her own perspective in responding to the question or statement. However, the child is not required to give any specific personal information proscribed by the above Act.

We now turn to the Tripletts' constitutional claims. The Establishment Clause of the United States Constitution and its counterpart of the Kentucky Constitution guarantee that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes state religious faith or tends to do so. *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992); U.S.C.A. Const. Amends. §§ 1, 14; Ky. Const. §§ 1, 5. The Free Exercise Clause of both constitutions prevents the government from regulating one's religious beliefs. U.S.C.A. Const. Amend. §§ 1, 14; Ky. Const. §§ 1, 5. In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), the United States Supreme Court applied the following three-part test in deciding whether the Establishment Clause had been violated:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243, 88 S. Ct. 1923, 1926, 20 L. Ed. 2d 1060 (1968); finally, the statute must not foster "an excessive government entanglement with religion." [*Walz v. Tax Commission of City of New York*, 397 U.S. 664, 668, 90 S. Ct. 1409, 1411, 25 L. Ed. 2d 697 (1970) ].

*Lemon v. Kurtzman*, 403 U.S. at 612-613, 91 S. Ct. at 2111-12.

In reviewing the KIRIS exam in light of KERA, we see that the exam has the secular legislative purpose provided for in KRS 158.6453(1), "to ensure school accountability for student achievement of the goals set forth in KRS 158.645." In reviewing the content of the KIRIS exam questions in the record, we do not see that the exam advances or inhibits religion, nor that it fosters any government entanglement with religion. While some questions contain pop culture references, humorous elements, or touch on current and/or controversial events or issues, we fail to see how they could be interpreted as attempting to promote or influence religious beliefs or send any message regarding religious beliefs.

In adjudging that the content of the KIRIS exam itself does not violate the Establishment Clause, we must do so from our own concept of religion, and we do not presume to question the genuineness of the Tripletts' claims that the KIRIS exam offends their religious and moral sensibilities. Nevertheless, not every state action implicating religion is invalid if one or a few citizens find such an

action offensive. *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992). So long as the state action does not, by any realistic measure, create any of the dangers which the First Amendment was designed to protect and does not so directly or substantially involve the state in religious exercises or in the favoring of a religion as to have a meaningful and practical impact, there is no First Amendment violation. *Lee v. Weisman, supra.*

In *Smith v. Board of School Commissioners of Mobile County*, 827 F.2d 684 (11th Cir. 1987), plaintiffs objected to the school's use of certain home economics, history and social studies textbooks on grounds that they advanced certain religious beliefs and, thus, violated the Establishment Clause. The Court upheld the use of the books and held that the government action must amount to an endorsement of religion in order for the government's conduct to have the primary effect of advancing religion in violation of the Establishment Clause. The Court further stated that it is not sufficient that the government action merely accommodates religion or confers an indirect, remote, or incidental benefit on a particular religion or happens to harmonize with the tenets of a religion. Similarly, in *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987) *cert. denied* by 484 U.S. 1066, 108 S. Ct. 1029, 98 L. Ed. 2d 993 (1988), parents objected to a school's requirement that children read from a particular textbook they found offensive to their religious beliefs. The Court held that absent any proof that a student was ever called upon to say or do anything that required the student to affirm or deny a religious belief or to engage or refrain from engaging in any act required or

forbidden by the student's religion, there was no violation of their right to free exercise of religion. Even assuming that some KIRIS exam questions do conflict with certain religious beliefs held by the Tripletts, the exam clearly does not have the primary effect of advancing religion, nor do the questions require the students to affirm or deny any religious belief.

In *Rawlings v. Butler, Ky.*, 290 S.W.2d 801 (1956), an action was brought against a public school because nuns who were teaching at the school were allowed to dress in religious habit and wear symbols of their religion. The Court held there was no First Amendment violation because the nuns did not inject religion or the dogma of their church into what they taught. Paraphrasing from a concurring opinion of Justice Jackson of the United States Supreme Court in *People of State of Ill. ex rel McCollum v. Board of Education of School Dist. No. 71.*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948), the Court stated:

> He further states there are 256 separate and substantial religious bodies in this country and if we are to eliminate everything that is objectionable to any of these warring sects, or that which is inconsistent with their doctrines, "we will leave public education in shreds." [333 U.S. at 235-37, 68 S. Ct. at 477.]

*Rawlings v. Butler, Ky.*, 290 S.W.2d at 805.

Even if the governmental action substantially burdens a religious practice, if it is justified by a compelling state interest, it survives a free exercise of religion challenge. *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). The First Amendment does not prevent the government from regulating behavior associated with

religious beliefs. *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982).

In *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 1600, 108 L. Ed. 2d 876 (1990), the Court held the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Quoting United States v. Lee*, 455 U.S. at 263, 102 S. Ct. at 1058-59. In *Smith, supra*, a showing of a compelling state interest was not required because the law was valid and neutral and of general applicability. As to whether a strict scrutiny analysis is required in the instant case, we turn to the case of *Vandiver v. Hardin County Board of Education*, 925 F.2d 927 (6th Cir. 1991) for guidance.

In *Vandiver, supra*, a student in Kentucky who had been in a home study program sought to transfer to a public school, and the public school required the transferee to pass an equivalency exam in order to gain credit for the school work performed in the home study program, pursuant to 704 KAR 3:307 § 2. The student objected to the testing requirement on rather tenuous religious grounds (studying for the test required more work than God would want him to bear). Nevertheless, the Court considered his claim, as it did not question the sincerity of his religious convictions. Relying heavily on *Smith, supra*, the Court found that the regulation at issue was generally applicable and religion-neutral such that a strict scrutiny analysis was unnecessary. However, in dicta, the Court went on to further interpret *Smith, supra*, and

stated that if the statute not only affects the free exercise of religion, but also burdens other constitutionally protected rights such as that of a parent to direct the education and upbringing of his children, the claim remains subject to strict scrutiny. Thus, although we deem the KIRIS testing requirement in the instant case to be generally applicable and religion-neutral, we shall nevertheless proceed with a strict scrutiny analysis since the Tripletts additionally claim that their parental rights have been violated.

The basis of the Court's ruling in *Rose v. Council for Better Education, Inc., Ky.*, 790 S.W.2d 186 (1989) is that education is a fundamental right in Kentucky and that the government must provide an efficient system of common schools that would be substantially uniform throughout the state and afford equal educational opportunities to every child within the state. If a constitutionally efficient educational system is one that is uniform and provides equal opportunities, there must be a way to measure whether all students are receiving equal opportunities beyond simply the resources that are being provided. The performance-based assessment process mandated by KERA is such a measuring device. Our Supreme Court has recognized the importance of statewide assessment of all schools in *Board of Educ. of Boone County v. Bushee, Ky.*, 889 S.W.2d 809 (1994), wherein the Court attempted to clarify the responsibilities of the State Board, the local school boards and school councils under KERA. The Court stated:

> Other responsibilities of the State Board are directed in KRS 158.6453. These directives primarily focus on the need for statewide assessment of the achievements of each local

> institution in terms of the stated statewide objectives. These reflect the need for statewide accountability for achievement of outlined objectives.
>
> . . .
>
> These responsibilities clearly reflect that area of education that most effectively rests at the statewide level. In order to assess the overall success of the educational reforms, the legislature recognized that it is imperative that a body representing statewide interests be held accountable for establishing a system whereby these objectives can best be achieved. Further, the statute recognizes that each individual school will be held accountable to the State Board for its performance. Also reflective of this structural approach are the mandates of KRS 158.6455 which require the State Board to "establish a system of determining successful schools and dispensing appropriate rewards."

*Id.* at 813.

It appears that there is no higher priority in Kentucky at the present time than education. Therefore, the state's interest in the improvement of our educational system through the use of an assessment program such as the KIRIS exam is sufficiently compelling to require all students to take the KIRIS exam. We do not see how an assessment process can measure performance in terms of educational equality and progress unless all students are required to take the exam.

We now move on to the Tripletts' claims regarding the KIRIS assessment process. They maintain that the KIRIS exam is subjective and arbitrary and, therefore,

lacks reliability in that it does not measure either the child's or the school's performance accurately. One complaint in particular is that the exam should be completely multiple choice. (The exam contains multiple choice, open-response and essay questions.) Both sides have submitted affidavits of experts stating their positions on the KIRIS exam. While the KIRIS assessment exam may not be perfect (doubtless, no testing process is), we are not being called upon, and indeed it is not our place, to pass on the relative merits and flaws of the exam. Rather, it is our responsibility only to adjudge whether its requirement rises to the level of a constitutional or statutory violation. We hold that it does not.

The final issue before us is the school's appeal of the court's rulings that the KIRIS exam must be open for public inspection. The Tripletts contend that the public should be allowed unfettered examination of such exams.

KRS 61.878(1)(g) provides the following exemption from the Kentucky Open Records Act (KRS 61.870-61.884):

> (1) The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction, except that no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery.
>
> . . . .
>
> (g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or

> academic examination before the exam is given or if it is to be given again[.]

Assuming the KIRIS exam about which the Tripletts complain will be administered again in the future, the KIRIS exam clearly falls within the above-stated exemption even in view of the strict construction requirement in KRS 61.871.[1] However, the lower court bypassed the statute and, instead, applied a balancing test, finding that "[a]ny prejudice the Defendants may incur because of this public disclosure is far outweighed by the public's need to know."

Recently, the Supreme Court of Iowa was faced with the same issue in *Gabrilson v. Flynn*, 554 N.W.2d 267 (Iowa 1996), when a local school board member sought to make public a high school assessment test. The Court declined to apply a balancing test, reasoning that there was no indication that the legislature intended such a balancing of interests since they specifically excepted examinations from the open records law. Hence, the Court ruled that the assessment exam was not covered by the open records law and could not lawfully be disclosed.

The Tripletts argue that KRS 61.878(1) authorizes the court to order that the KIRIS exam be made open for public inspection. The language of the statute does allow a court of competent jurisdiction the authority to order an exempted record to be open for inspection. However, a court does not have unbridled discretion in exercising that authority, and we believe the lower court abused its

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[1] Once the test is given *and* if it will not be administered again, KRS 61.878(1)(a) does not apply.

discretion in the present case when it ordered the KIRIS exam open for public viewing. Given the importance of the KIRIS exam as a tool for measuring the efficiency and improvement of our schools as we have previously discussed in this opinion, and its potential for abuse, we believe the KIRIS exam should not be open for general public viewing without a special showing of necessity beyond simple curiosity as to its content. In our view, permitting the exam to be indiscriminately viewed by the public would interfere with the accomplishment of the objectives for which it was devised. It would certainly jeopardize the integrity and reliability of the exam. However, where, as here, there are specific allegations about the exam that are the subject of a lawsuit, the court could properly order the exam open for limited viewing for purposes of the litigation. Accordingly, the court's orders requiring the KIRIS exam to be open for public inspection are reversed and the cause remanded for an order sealing the portions of the record containing the KIRIS exam questions.

The Tripletts also argue that they, as parents, have a right to view the KIRIS exam under the following provision of 20 USCA § 1232h(a) of the Hatch Amendment:

> All instructional materials, including teacher's manuals, films, tapes, or other supplementary material which will be used in connection with any survey, analysis, or evaluation as part of any applicable program shall be available for inspection by the parents or guardians of the children.

In reading the above provision, we do not believe that an assessment exam such as the KIRIS exam falls

within its purview. Although the KIRIS exam is a requirement for promotion and graduation, it is not a part of the student's regular curriculum and has no instructional purpose.

For the reasons stated above, the judgment of the Livingston Circuit Court is affirmed in part, and reversed and remanded in part for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS (IN 96-CA-1046)/ APPELLEES (IN 96-CA-1371):

James F. Dinwiddie
Leitchfield, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE (IN 96-CA-1046)/APPELLANT (IN 96-CA-1371):

David L. Yewell
Owensboro, Kentucky

COMMONWEALTH OF KENTUCKY

LIVINGSTON CIRCUIT COURT
CIVIL ACTION NO. 94-CI-00062

CHAD ALAN TRIPLETT, ET AL PLAINTIFFS

VS

**FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT**

LIVINGSTON COUNTY BOARD OF EDUCATION, ET AL DEFENDANTS

## INTRODUCTION

(Entered Feb. 22, 1996)

This is a petition for permanent injunction and declaratory judgment filed by the Plaintiffs and is rooted in provisions of the Kentucky Educational Reform Act (KERA) passed by the General Assembly in 1990. More especially, this suit arises out of the provision which required a statewide performance-based assessment program as directed KRS 158.6453 and 158.6455. This assessment program was for the purpose of demanding accountability for student achievement of the goals set forth in KRS 158.6455 and which were those goals mandated by the Kentucky Supreme Court in *Rose v. Council for Better Education,* 790 S.W.2d 186 (1989).

The statewide assessment program required each of the state's school districts to participate in a testing program known as Kentucky Instructional Results Information System (KIRIS).

KIRIS therefore became a statewide testing system required of each school district wherein all students would be given standardized examinations which would be utilized not for the primary purpose of testing the student, but for evaluating the school system. To insure a complete and genuine evaluation of the particular district, all students within that system who were enrolled in Grades 4, 8 and 12 were required to participate in this testing. Performance levels of Novice (being the lowest), Apprentice, Proficient and Distinguished were established. Each of these performance levels were given a rating from 0 points for the Novice to 140 points for the Distinguished. Through a fairly complicated formula, the grades of the individuals tested were computed into an overall school rating. The testing provided both cognitive (academic) and non-cognitive data (dropout rates, attendance, retention rates, etc.) which came together first to form a baseline score. Once the scores were established thresholds, or goals, were established for each school to meet. If the school exceeded the threshold by one point and moved ten percent or more of their students out of the "Novice" level, they were considered successful and qualified for rewards. Schools that did better but did not meet their goals developed improvement plans and worked to raise their levels of achievement. For those schools in crisis whose scores dropped below their baseline, assistance was made available.

Simply put, those school districts where students do well on the KIRIS Test are rewarded; and those school districts where students do poorly are penalized. The law provided for sanctions to be imposed upon those in crisis. Rewards are given to those districts that are successful.

Therefore, each school district in this state has a financial interest in the outcome of the test scores of KIRIS examinations given within their district.

While KRS 158.6455 requires that the school accountability system include all students, the law basically provides local school districts with the broad authority over the method of how participation in the assessment process will be required. This includes the authority of the local Board of Education – Defendants in this action – to make the taking of the KIRIS Test a requirement for both promotion and graduation when appropriate. The Defendant, Livingston County Board of Education, did on February 16, 1994, pass a policy which required students in the Livingston County School System in Grades 4, 8 and 12 to take the KIRIS Test in order to be promoted to the next grade or graduate, as the case might be.

## FINDINGS OF FACT

In the spring of 1994, the Plaintiff, Chad Allen Triplett, who was a senior at the Livingston County High School, and Tracy Leigh Triplett, who was in the eighth grade at Livingston County Middle School, refused to participate in the KIRIS testing. As a result of their refusal and consistent with Board policy, the Plaintiff, Chad Allen Triplett, was not afforded his degree of graduation; and Plaintiff, Tracy Leigh Triplett, was not promoted to the fifth grade.

The student Plaintiffs as well as their parents bring this declaratory judgment action attacking the requirement that Chad and Tracy Triplett take the test on various grounds. The essence of their claims are as follows:

1. The Plaintiffs are objecting to the requirement of the student Plaintiffs taking the KIRIS testing on the grounds that it discriminates against them on the basis of religion, that it infringes upon the parental rights of the parents, it invades the privacy of the family, infringes on the right of free speech by compelling children to speak against his or her wishes by selecting morally objectionable responses, and that it establishes a religious or moral code in opposition to that of the children and parents.

2. That by imposing the requirement of taking the KIRIS test, the Defendants are acting unreasonably and arbitrarily, and such action is a deprivation of property and rights guaranteed by the due process clause of the 14th Amendment to the United States Constitution. In addition, it is contended that such requirement violates the protection of the Family Educational Rights and Privacy Act and the Pupil Rights Amendment, 20 U.S.C., Section 1232h, 34 CFR, Sub-Title A, Section 98.1.

3. That the imposition upon the student Plaintiffs of requiring them to take the KIRIS Test imposes upon them values which for reasons relating to religion and morals they feel bound to reject. The Plaintiffs further contend that the imposition of the requirements for assessment and evaluation and grading of opinions and beliefs violates the establishment of religion clause of the First Amendment to the United States Constitution and that it imposes state chosen values upon Christian students in the public school system by certain preferences in the grading of beliefs and opinions. It is further contended that such action calls for excessive entanglement between state and religion by establishing a grading criteria for beliefs and opinions.

4. The Plaintiffs contend that the KIRIS Test is a violation of their constitutional right to privacy.

Pursuant to a Court Order and through a Special Commissioner appointed by the Court, the Plaintiffs have selected the particular questions to which they take objection. These test questions were certified by the Special Commissioner and tendered to the Court and have been read by the Court.

The Court denied a request by the Plaintiffs for production of the Scoring Rubrics. Since the student Plaintiffs did not take the examination, the scoring of them are irrelevant for Declaratory Judgment purposes. It is also important to point out once again that the grading only affects the school system, and not the student. The petition itself acknowledges this fact.

This is a declaratory judgment action which in effect is requesting a permanent injunction. Being an equitable action, the Court alone must determine the issues – both factual and otherwise – and not a jury.

The Court finds that for this declaratory judgment action, there is no material issue of fact. The critical issue for this Court to determine in granting an injunction are not in dispute. The student Plaintiffs were required to take the KIRIS examinations to which they objected and refused to take. There is no dispute that the exam questions selected by the Plaintiffs with the Commissioner were the ones administered at the times in question.

Therefore, it is a question of law for the Court on this motion for temporary injunction to review these questions and make a determination if they do, in fact, substantiate the claims made by the Plaintiffs in the Complaint.

The Plaintiffs submit that expert testimony is needed to enlighten the Court as to the critical issue at hand – whether the testing violates the Plaintiffs' rights of imposing beliefs and values upon the Plaintiffs as enumerated in their Complaint. The Defendants have also submitted affidavits from their experts. The Court is of the opinion that as the Complaint is drawn in this action, the matter becomes clearly a question of law for the Court to determine upon reviewing the record as it exists. It is a question for the Court and the Complaint requires no elucidation which could be provided by expert testimony.

In looking at the standard of expert testimony, the Court considers the same criteria as that which would be used for a jury trial. It is best stated in the case of *Greers Administrator v. Harolds Administrator,* 206 S.W.2d 943 (1947).

> The general rule as to the admissibility of expert testimony is that persons having a technical or peculiar knowledge on certain subjects are allowed to give opinions when the question involved is such that the jurors are incompetent to draw their own conclusions from the evidence without the aid of such expert testimony. One of the cardinal rules governing the admission of expert testimony is that it must usually be of such a character as not to fall within a range of common experience and observation,

> therefore not to be intelligible to jurors without the aid of opinion.

Certainly, the expert testimony proposed by the Plaintiffs does not fall within these guidelines. Furthermore, it should be pointed out that the Court is awarded wide discretion as to whether such would be of assistance in its determination. See *Kentucky Evidence Law Handbook*, Robert G. Lawson, Section 115, "Expert Testimony."

The Court is charged with a certain factfinding mission in this case, but it is one which is contained within the four corners of the exams themselves. For it is exposure to the examinations to which the Plaintiffs are complaining. The experts tendered by the Plaintiffs would invade the province of the Court in attempting to explain how certain questions violate the constitutional rights and statutory rights of the student Plaintiffs. The question before this Court is simple. Does the KIRIS Test required to be taken by the student Plaintiffs violate their constitutional rights? If they do, then the student Plaintiffs should not be required to take the exam nor penalized for their failure to do so. If they do not, then they should have to take the exam like every other student.

The Plaintiffs are not specific in either their Complaint or their memorandum as to exactly how the questions to which they object violate their religious persuasion. In fact, there is no evidence in the record as to what religious faith the Plaintiffs belong and which is threatened by these questions. The Plaintiffs were afforded all the time they needed, including note taking,

in reviewing these examinations; yet their objections are only couched in very vague and general terms.

Only in their memorandum do the Plaintiffs make a general list of objections which the Court turns to at this time. That list is as follows:

1) Environmentalism Viewpoint is Promoted

2) Animal Rights are Promoted

3) Military Reduction is Promoted

4) Lack of Traditional Patriotic Content

5) Feminism is Promoted

6) Multi-Culturalism is Promoted

7) Socialism is Promoted

8) Negativism, Depressive Content is Great

9) Humanism is Promoted

10) Evolution is Promoted

11) Otherwise Harmless Questions are Clothed in Social and Political Context

12) Imagination, Not Right and Wrong Answers are Sometimes Sought

13) Sharing/Cooperation Over Rugged Individualism

14) Groups Stereotyped

15) Brands of Goods, Services and Advertising Promoted

16) Tradition is Criticized in Favor of Liberalism

17) Religion is Cast in a Negative Light

18) Gun Control is Promoted

1. Environmentalism Viewpoint is Promoted

Undoubtedly, many of the reading problems deal with the environmental issues. They generally express a need to take care of our environment – a concept which is so universally accepted so as to hardly be controversial. ("Be fruitful and multiply and fill the earth and subdue it and have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth." Genesis 1:28.)

2. Animal Rights are Promoted

The Court finds nothing drastic or even untraditional in these writings. The Plaintiffs have used the politically trendy word "animal rights" apparently to describe themes which have throughout the ages been included in our traditional educational framework, i.e. *Bambi, Ode to a Waterfowl, White Fang,* etc.

3. Military Reduction Promoted

The Court found no evidence of this whatsoever.

4. Lack of Traditional Patriotic Content

Quite to the contrary, the Court finds running throughout many of the reading exercises in this testing stories drawn from the broad and colorful fabric of American life. From Appalachian craft to the inner cities, from stories of Lincoln to the strengths of American industry, there evolves a glowing account of a country teeming with opportunity and liberty for all persons regardless of their race, color, creed or religion.

5. Feminism is Promoted

There are articles for purposes of comprehension which relate historical information about women, and their involvement in our evolving society. And while the content of some of these writings may be interpreted as a promotional of feminism (i.e. Seneca Resolutions of 1848), there are no concept [sic], principles or thoughts advanced which have not already been incorporated into the law of the land. So to support the claim that feminism is promoted throughout these tests, one must also adopt the proclamation that the law of the land is promoted.

6. Multi-Culturalism is Promoted

Here the Court finds one of the contradictions in the Plaintiffs' position. Many of the answers do deal with people from varying ethnic, racial and religious background all of which are a part of the American melting pot tradition. For many, these stories are highly patriotic in that they promote the American ideal. "I hear America singing," proclaimed the great American poet, Walt Whitman. "Their varied carols I hear."

7. Socialism is Promoted

No evidence of this was found. Where such things as health care are depicted, they are done so in an innocuous manner and one which simply reflects reality without advocating any particular political bent. In fact, there are some questions which seem to be drawn in a manner which shows how socialism has fared poorly. (See Question 19, Social Studies Session, Form 1, Grade 12)

8. Negativism, Depressive Content is Great

The negative and depressive content of the reading material is not great. Several of the stories are uplifting, positive and constructive. There are some which deal with tragedy and the darker side of human existence. But so do the classic works of Shakespeare, Hemingway, Poe, and Washington Irving. Certainly none of these rises to a level that gives rise to an objection rooted in law.

9. Humanism (Anti-Christianity) is Promoted

This allegation is one of those which caused the Court the most concern as for [sic] as the First Amendment claims are concerned. The Court closely scrutinized the questions to find any evidence of this. The Court found nothing in the content of the questions which was anti-Christianity. The terms "Humanism" and "Christian" are interpreted by many not to be mutually exclusive. On no account did the court find anything in the questions which promoted one religion over another, and certainly nothing in the questions which demeaned any religion.

10. Evolution is Promoted

There is no evidence of evolution being promoted within these questions any more than there is within the context of our science textbooks utilized within the public school system.

11. Otherwise Harmless Questions are Clothed in Social and Political Context

As mentioned before, it is practically impossible to extra writings for reading comprehension which do not fall within some type of social or political context. Only

the most elementary and juvenile text, such as "Alice and Jerry", are going to be void of time and place.

12. Imagination, Not Right and Wrong Answers are Sometime Sought

This is true. That is because in almost all the questions asked, there is no right or wrong answer. In fact, some of the questionnaires advise the student that if they felt uncomfortable answering any question, they should leave it blank.

13. Sharing/Cooperation Over Rugged Individualism

This is a puzzling objection. It is also contradictory to the complaint that the questions lack any patriotic content. Both rugged individualism and sharing/cooperation have both been a major part of the American experience.

Feats of rugged individualism are peppered throughout the testing. "Backwoods Boy" – story of Abraham Lincoln, Form 3, Grade 8; "Adapting to a New Environment", Form 6, Grade 8; and "Raymond's Run", Form 1, Grade 12, are just a few examples. It seems to the Court that this is a perfect blend of the so called sharing cooperation as well as rugged individualism, both of which are valuable concepts of the American experience.

Further contradictions in the Plaintiffs' contention is evidence under this heading. "Priscilla and the Wimps", Form 11, Grade 8, is by a female heroine which might be a source of contention that feminism is promoted. However, it is likewise an example of rugged individualism being touted.

14. Groups Stereotyped

The Court finds no basis for this assertion in the questions.

15. Brands of Goods, Services and Advertising Promoted

Where this occurs, it appears to simply be done to give the questions a more lifelike relevancy and to place them in realistic context. The manner in which this has been done seems to the Court to be totally innocuous and inconsequential. It would further seem to the Court that persons having standing to object to this practice are not currently before the Court.

16. Tradition is Criticized in Favor of Liberalism

The Court finds there is no basis for this allegation.

17. Religion is Cast in a Negative Light

The Court finds there is no basis for this allegation.

18. Gun Control is Promoted

The Court finds there is no basis for this allegation. The Court found two discussion questions relating to this issue, neither of which promoted any particular viewpoint.

After reviewing the documentation presented by both sides in this case, the Court is of the opinion that many of the contentions made by the Plaintiffs are political in nature. The value and validity of the testing process are attacked. This is illustrated by Plaintiffs' counsel's argument in their response to the motion for summary judgment where it is stated that, "In light of the serious

questions being raised in the General Assembly about the wisdom of putting millions more into this farce . . . ", these tests should be made public. Scores of reports and newspaper articles have been submitted, none of which are competent evidence in a court of law, even in summary judgment motions. These articles and documents and reports voice opinions highly critical of the KIRIS testing procedure. That is all well and good, but not relevant to the question before this Court – that is, have the Plaintiffs' rights been violated?

The Plaintiffs contend that the questions promote certain points of view. It is important to point out that the reading material in issue is simply submitted for the purpose of interpreting what the writer is saying, and not questioning one's own beliefs about the matter. The allegation in the petition that the KIRIS exams are for "grading of beliefs" is totally erroneous. Furthermore, the contention in the petition that the Plaintiffs are "compelled to disclose their beliefs" is totally erroneous and unfounded. The persons taking the exams are not required to give their own viewpoint, but simply to interpret what the writer is saying. After much reflection, the Court is of the opinion that it would be difficult, if not impossible, to devise any type of reading exam – especially one administered to such a large number of students as is the KIRIS examination – without opinions, interpretations and viewpoints bleeding through. That is why it is important to point out that by answering these questions, the student is not required to accept the viewpoint of the writer, but simply to interpret what the writer is saying.

The Court finds nothing in the examination questions which either interferes with the parental rights or the control in the upbringing of the children, infringes upon the free exercise of religion nor the establishment thereof, nor violates any of the rights under the Family Educational Rights and Privacy Act, nor their right to privacy. While the KIRIS assessment procedure as well as KERA itself may be subject to political debate, the implementation of that law has already been held to be legitimate and is not an exercise of arbitrary power in violation of Section Two of the Kentucky Constitution. (See *Chapman v. Gorman,* 839 S.W.2d 232 (1992).

Neither does the Court find that there is a taking of property without due process of law insomuch that it is unreasonable to expect school systems to produce questions to parents and students in advance.

## CONCLUSIONS OF LAW

While the Plaintiffs have made various claims against the Defendants' actions which have been addressed herein, the main thrust of their petition and that which the Court considers the most important is that the KIRIS examinations and the requirement to take them violates their religious rights under the First Amendment of the United States Constitution. The First Amendment and its counterpart of the Kentucky Constitution, Section Five, basically provide a two prong protection when it comes to religion. They are 1) the Free Exercise Clause; and 2) the Establishment Clause. The Establishment Clause prohibits the government from enhancing or endorsing religion while the Free Exercise Clause prohibits the

government from placing restraints on the free exercise of religion.

In 1963, the United States Supreme Court case of *Abington School District v. Schempp*, 374 U.S. 203 (1963), basically established two guidelines for determining whether a state action violates the Establishment Clause. They are pertinent to this case. The two guidelines to consider are does the state action either 1) have no secular purpose, or 2) have the primary effect of advancing or inhibiting religion?

In 1970, the Court in *Walz v. New York Tax Commission*, 397 U.S. 644, added a third consideration – whether a state action creates "excessive entanglement" between religion and government.

Therefore, there evolved a three point test in determining whether a state action has violated the First Amendment protection. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The Plaintiffs contend that taking the test imposes upon them a practice which violates their religious conviction. As stated previously, the Establishment Clause's purpose is to prevent government from advancing or endorsing particular religious beliefs or opinions upon individuals.

The Court turns to what has become known as the "*Lemon* Three Part Test" in evaluating this case.

1) *Has No Secular Purpose.* Obviously the Plaintiffs' complaint does not fall in this category. The secular purpose testing in regard to the Kentucky Educational Reform Act in evaluating schools. Regardless of what one

might think of the purpose and its validity, it advances a legitimate political end.

2) *Has the Primary Effect of Advancing or Prohibiting Religion.* The Court has noted in its findings herein that KIRIS testing does not have the primary effect of advancing or inhibiting any religion.

3) *Excessive Entanglement Between Religion and Government.* In reviewing the test questions herein, one has to stretch the questions almost completely out of shape to read any kind of "entanglement" between religion and the questions themselves. Therefore, the Court does not believe the questions create "excessive entanglement between religion and government." (See also the Kentucky case of *Kentucky Commission on Human Rights v. Kerns Bakery,* 644 S.W.2d 350 (1982).

A 1956 Kentucky case, which is still the law of this Commonwealth, is germane to the issue at hand. In *J. C. Rawlings v. Wendell P. Butler, et al,* 290 S.W.2d 801 (1956), complaint was made because Catholic Sisters were used as teachers in the public school, and were allowed to be dressed in religious habit and wear symbols of their religion. The classes were also being held on property belonging to the Catholic Church which was rented by the school board. The Court held that whatever influence which may have been exerted on the students by the dress of the teachers did not violate the First Amendment rights of the students in that case.

There is dictum in the *Rawlings* case drawn from the words of Justice Jackson of the United States Supreme Court which is particularly relevant to this case. " . . . there are 256 separate and substantial religious

bodies in this country and if we are to eliminate everything that is objectionable to any of these warring sects, or that which is inconsistent with their doctrines, 'we will leave public education in shreds."

## OPINION

To say that the Kentucky Educational Reform Act of 1990 is controversial would be a gross understatement. KIRIS has been one of the most controversial aspects of that educational reform. It has been the subject of much debate. The KIRIS testing has been attacked and defended by educators, politicians, news media and other interested persons. There is much that has been said for and against KIRIS, and the value of it as a statewide assessment tool has been severely questioned. However, as mentioned earlier, these are all political questions which must be dealt with by the legislature. The only question before this Court in this instant case is whether requiring the Plaintiff students to take the exam infringes upon their constitutional rights.

It is clear, as stated before, that the KIRIS testing is for the benefit of evaluating the school and not the student. The student questionnaire enclosed with the testing had a series of inquiries to include a request for the student to reflect upon how many of the answers given in the exam were the result of what they had learned in school and what they had not learned in school. In addition to the religious questions which have been brought to bear upon the examination, the Plaintiffs have contended that the examinations themselves impose certain

values upon the student. Any educational system is going to be dealing with values. An educational system without values is a valueless educational system. The only question is whether these values promoted invade or impose upon an individual's constitutional rights. For the reasons stated in the findings herein, the Court does not believe these questions pose that type of an imposition upon the Plaintiffs' conscience.

An issue such as this one can become a highly charged, emotional crusade. The Court must look at it in a cool and rational manner, and make sure that the individual students are protected from unwarranted invasion into their religious convictions, while at the same time allowing the school system to function as the legislature has mandated. This Court believes that the KIRIS examinations which have been made a part of the record and which are brought into question here do not impose upon nor violate the constitutional rights of the Plaintiff students.

The Court is in full and total agreement with the Plaintiffs on one point. The KIRIS examinations which have been brought into question, and marked and filed by the Special Commissioner, should and shall be made public. The people of Livingston County, as elsewhere, will have full opportunity to examine these questions for themselves. Any prejudice the Defendants may incur because of this public disclosure is far outweighed by the public's need to know.

As stated before, there are many people who, for various reasons, do not like the Kentucky Educational Reform Act of 1990. There are also many Kentuckians

who do not like KIRIS as a valid, legitimate and effective means of evaluating our school systems. These are well meaning and legitimate concerns worthy of public debate. At the same time, however, our educational system – to include our local Board of Education – must be empowered with the authority to carry out the dictates of this law as it has been mandated by the legislature. If local Boards of Education were not allowed to impose stringent sanctions as those imposed upon the Plaintiff's for their failure to take the KIRIS tests, chaos could be created. Unless there are compelling sanctions authorized, parents disagreeing with the educational laws of this state could simply have their children to boycott legitimate, if unpopular, requirements. If a sizable minority of Livingston County students refused to take the KIRIS examination, then the entire school system would suffer dramatically by being classified as a school in decline or in crisis, jeopardizing the interest of all students. Therefore, there must be convincing evidence that such sanctions impose upon the legitimate and constitutional rights of the complaining students and parents.

Of course, the Court recognizes that there are limits. If the Defendants were issuing condoms, prescriptions for birth control pills, PAP smears and tests for AIDS to the students of Livingston County High School, such actions might be an impermissible invasion of the school system into those matters which are exclusively within the rights of the parents.

However, if the wearing of a religious garb by school teachers as in the *Rawlings* case has not been considered an unlawful imposition of either religious influence or

It can be argued that not since the Ten Commandments has there been a more powerful and meaningful law than the First Amendment to the United States Constitution. One never reads it without being inspired by its majesty and power.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Educational systems must be allowed to function, and religion must be allowed to breathe unfettered without infringement of one upon the other. Generally speaking, through the courts of this land, the American people have been blessed with over two hundred years of a perfect balance between these compelling interests. This Court finds that the Defendants herein have not violated that most sacred objective.

For all the above stated reasons, **IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:**

1. Declaratory Judgment is **DENIED**; and the above styled action is **DISMISSED.**

2) Those examination questions marked and filed of record the Special Commissioner shall be open and public record.

3) All costs of this action shall be borne by the Plaintiffs.

This is a final and appealable order, and there is no just reason for delay.

This 20th day of February, 1996.

/s/ Bill Cunningham
Bill Cunningham
Circuit Judge

COMMONWEALTH OF KENTUCKY
LIVINGSTON CIRCUIT COURT
CIVIL ACTION NO. 94-CI-00062

CHAD ALAN TRIPLETT, ET AL. PLAINTIFFS

VS

LIVINGSTON COUNTY BOARD OF EDUCATION, ET AL. DEFENDANTS

ORDER

(Entered March 14, 1996)

The Defendants have filed a motion to amend the Findings of Fact, Conclusions of Law, and Order and Judgment entered by this Court on February 22, 1996. In that motion, Defendants ask the Court to provide qualifying language to the Order and Judgment whereby any review of the KIRIS Test be conducted at the Central Office of the Livingston County Board of Education after a non-disclosure agreement has been entered into by those parties requesting to review the test.

Telephonic conference was held on this motion at 1:00 on March 11, 1996. The Court having heard counsel from both sides express their positions on this motion, HEREBY ORDERS AND DIRECTS AS FOLLOWS:

The motion to amend the Findings of Fact, Conclusions of Law, and Order and Judgment entered on February 22, 1996, is DENIED.

The Court strongly believes the public should have the right to read and review these tests with the least amount of trouble. As stated in the original Order and Judgment, the public's right to know far outweighs any inconvenience which might be caused to the Defendants.

The Court hereby expands upon the original Order and Judgment by ORDERING AND DIRECTING that the test questions shall remain open to public review at the Livingston County Circuit Court Clerk's Office, and persons wishing to do so shall be provided with a comfortable place and sufficient time to read and review the test questions submitted of record including the right to take notes. However, IT IS FURTHERMORE ORDERED AND DIRECTED that the Livingston Circuit Court Clerk SHALL NOT ALLOW NOR PERMIT photocopying of the test questions. The reason for this modification is as follows: 1) The limited staff of the Livingston County Circuit Court Clerk's Office makes it unduly burdensome for that office to either make copies themselves or supervise and monitor the copying of the same; 2) Copying and wholesale distribution of these tests may impair their integrity for future use in a way in which the Court is not currently aware; 3) The public's right to know can be fully accommodated without mechanical duplication of the tests.

This is a final and appealable Order and there is no cause for delay.

This 13th day of March, 1996.

/s/ Bill Cunningham
Bill Cunningham
Circuit Judge

COMMONWEALTH OF KENTUCKY
LIVINGSTON CIRCUIT COURT
CIVIL ACTION NO. 94-CI-00062

CHAD ALAN TRIPLETT, ET AL. PETITIONERS

VS

LIVINGSTON COUNTY BOARD OF EDUCATION, ET AL. RESPONDENTS

ORDER

(Entered April 11, 1996)

The Respondents having filed a motion for relief and judgment order dated April 3, 1996; and the Court having reviewed said motion, HEREBY ORDERS AND DIRECTS that said motion is DENIED without benefit of hearing.

This is the second motion made by the Respondents pursuant to Civil Rule 60.02 and very similar to the previous one. The Court held a telephonic conference on that motion and entered an Order.

The Court has grown intimately familiar with the state KIRIS system as well the testing procedure; and, as it has reconsidered and ruled before, it considers the public's right to know far more important than any damage which the testing system might sustain as a result of the Court's ruling.

This is a final and appealable order.

This 9th day of April, 1996.

/s/ Bill Cunningham
Bill Cunningham
Circuit Judge

**Commonwealth Of Kentucky**
**Court Of Appeals**

NO. 94-CA-1046

APPEAL FROM LIVINGSTON CIRCUIT COURT
ACTION NO. 96-CI-0062
OPINION RENDERED: AUGUST 15, 1997

CHAD TRIPLETT, TRACEY TRIPLETT,
ET AL — APPELLANTS

V.

LIVINGSTON COUNTY BOARD OF EDUCATION,
LEE JONES, ET AL — APPELLEES

and

96-CA-1371

APPEAL FROM LIVINGSTON CIRCUIT COURT
ACTION NO. 94-CI-0062
OPINION RENDERED: AUGUST 15, 1997

LIVINGSTON COUNTY BOARD OF EDUCATION,
LEE JONES, ET AL — APPELLANTS

V.

CHAD TRIPLETT, TRACEY TRIPLETT,
ET AL — APPELLEES

ORDER DENYING PETITION FOR REHEARING

* * *

BEFORE: COMBS, DYCHE, and SCHRODER, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: Oct 10, 1997

/s/ Sara Combs
JUDGE, COURT OF APPEALS

**Supreme Court of Kentucky**
97-SC-912-D
(96-CA-1046 & 96-CA-1371)

LIVINGSTON CIRCUIT COURT
NO. 94-CI-62

CHAD TRIPLETT, ET AL. MOVANTS

V.

LIVINGSTON COUNTY BOARD
OF EDUCATION, ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED June 10, 1998.

/s/ Robert F. Stephens
Chief Justice

**KRS 158.645. Capacities required of students in public education system.**

The General Assembly recognizes that public education involves shared responsibilities. State government, local communities, parents, students, and school employees must work together to create an efficient public school system. Parents and students must assist schools with efforts to assure student attendance, preparation for school, and involvement in learning. The cooperation of all involved is necessary to assure that desired outcomes are achieved. It is the intent of the General Assembly to create a system of public education which shall allow and assist all students to acquire the following capacities:

(1) Communication skills necessary to function in a complex and changing civilization;

(2) Knowledge to make economic, social, and political choices;

(3) Understanding of governmental processes as they affect the community, the state, and the nation;

(4) Sufficient self-knowledge and knowledge of his mental and physical wellness;

(5) Sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;

(6) Sufficient preparation to choose and pursue his life's work intelligently; and

(7) Skills to enable him to compete favorably with students in other states. (Enact. Acts 1990, ch. 476, Pt. I, § 2, effective July 13, 1990.)

20 U.S.C. **§ 3401(3). [P]arents have the primary responsibility for the education of their children, and States, localities, and private institutions have the primary responsibility for supporting that parental role.**

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**20 U.S.C. § 1232h. Protection of pupil rights**

**(a) Inspection by parents or guardians of instructional material.** All instructional material, including teacher's manuals, films, tapes, or other supplementary instructional material which will be used in connection with any research or experimentation program or project shall be available for inspection by the parents or guardians of the children engaged in such program or project. For the purpose of this section "research or experimentation program or project" means any program or project in any applicable program designed to explore or develop new or unproven teaching methods or techniques.

**(b) Psychiatric or psychological examinations, testing, or treatment.** No student shall be required, as part of any applicable program, to submit to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning:

(1) political affiliations;

(2) mental and psychological problems potentially embarrassing to the student or his family;

(3) sex behavior and attitudes;

(4) illegal, anti-social, self-incriminating and demeaning behavior;

(5) critical appraisals of other individuals with whom respondents have close family relationships;

(6) legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or

(7) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program), without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of unemancipated minor, without the prior written consent of the parent.

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COMMONWEALTH OF KENTUCKY
LIVINGSTON CIRCUIT COURT
FILE NO. 94-CI-00062

CHAD TRIPLETT, ET AL. PETITIONERS,

VS AFFIDAVIT OF RENEE KELLEY

LIVINGSTON COUNTY BOARD OF EDUCATION, ET AL, RESPONDENTS.

Comes Renee Kelley, of 1214 Borders Lane, Bardstown, KY 40004, and after being duly sworn, states:

1. I am a parent and a school teacher with a Masters Degree in General Education. I took a leave of absence to study the effect of KERA, including the KIRIS assessment on students. Because of the concerns of myself and many other parents and educational professionals, the Kentucky Department of Education (KDE) invited me to participate in the KIRIS Sensibility Assessment Review Committee meeting on June 8, 9, and 10, 1994, in Frankfort, where we examined the tests. Attached is a copy of my guest editorial in the Kentucky Standard newspaper dated March 1, 1995, setting forth some of the criticisms of the tests. I continue to monitor and study these tests, and have done a considerable amount of research on it.

2. There is a great deal of secrecy practiced by KDE regarding the tests, which I find absurd, considering the importance of the matter and the interest and rights of parents to know what is going on with our children. Before they allowed me to see the test, they had me sign a non-disclosure statement. Because of the slanted nature of the tests, I can understand why they would want it secret, but I think the public and the Court certainly need to know about it. Further, KDE officials have intimidated

teachers and school officials with the loss of their jobs if they criticize KERA. The fear tactics have been serious and widespread. Even William Spady, one of the leading national supporters of outcome based education, described KERA as the "most punitive of the fifty states."

3. We need reform in education, but KERA is lowering the quality of the education. Some of the test questions foster dissension in the family and create disrespect in the students for their parents. Some questions promote political issues and agendas, which are not academically appropriate. Much of the test is totally unrelated to traditional academic content, and does not measure scholastic aptitude. Many questions are totally inappropriate. One should not ask a fourth grader to answer such questions as "How would you solve the homeless problem", or "Is suicide ever justified." Research from John Hopkins University calls such nonsense "a leveling process" and a "ceiling effect". It has also been referred as "dumbing down."

4. The state has been duped by slick marketing of very clever businesses, behavioral psychologists and organizational sociologists, who admit their goals are social and economic restructuring. There is a distinct bias written into the test questions, answer choices and scoring guides. It is easy to see a strong feminist and environmentalist agenda, as well as liberal notions about such things as animal rights, racism, humanism, military disarmament, national health care, traditional families and religious beliefs, etc. "Politically correct" answers have been given higher scores in the past.

5. Students are not treated equally or fairly on the tests. The testing is arbitrary and vague. Many questions are simply bad questions. Often a wrong answer is given a better score than the right answer for absurd reasons. On many questions there is no right or wrong answer. A slow child may score higher than a bright child. Some questions have more than one correct answer. A gifted child may be stressed out trying to decide which of the right answers is wrong, while a slower student may simply mark an answer and get as good a grade. Too much value is place [sic] on opinion and viewpoint and if the evaluator doesn't agree with the opinion or the manner in which it is expressed, the student receives a lower grade. Many of these evaluators are recent college graduates needing summer jobs, who have had no real teaching experience. A child who has failed to learn the basics of a traditional education in school may make a better grade on this simply by being able to ramble well.

7. There are many better ways of testing students than the KIRIS test, which is going to ruin our educational system, and has already damaged many young lives.

Further the affiant sayeth not.

/s/ Renee Kelley
Renee Kelley

Subscribed and sworn to before me by Renee Kelley this 30th day of April, 1995.

/s/ Sharon Gail Yates
Notary Public:
KY State at Large
My Comm Esp: 5/17/97

Commonwealth of Kentucky
Livingston Circuit Court
File No. 94-CI-00062

Chad Triplett, et al, Petitioners

VS

Affidavit
of
Dr. George K. Cunningham Ph.D.

LIVINGSTON COUNTY BOARD OF EDUCATION, ET AL, RESPONDENTS

Comes Dr. George K. Cunningham, Ph.D., Department of Educational & Counseling Psychology, School of Education Building, Rm 317, University of Louisville, KY 40292, and after being duly sworn:

1. My Ph.D. is in Educational Psychology and my area of specialization is measurement and evaluation. I teach courses in testing and measurement at the University of Louisville and I have authored three textbooks in this field, two of these have already been widely adopted. The third will be published later this year.

Cunningham, G. K. (1986) *Educational and Psychological Measurement.* New York: Macmillan.

Thorndike, R. M., Cunningham, G. K., Thorndike, R. L. & Hagen, E. (1991) *Measurement and Evaluation in Psychology and Education.* New York: Macmillan.

Cunningham, G. K. (In press) *Assessment in the Classroom.* Englewood Cliffs: New York.

I have conducted extensive studies of the KIRIS accountability system of KERA and presented a paper on this topic at the Annual Meeting of the American Educational Research Association, April 18-22, 1995, titled

"Implementing a statewide performance-based accountability system," which focused on the KERA accountability system.

2. In 1990, the Kentucky General Assembly passed KRS 158.6451, otherwise known as Kentucky Education Reform Act (KERA). One important aspect of this legislation was the establishment of instructional goals intended to define what students in Kentucky were supposed to learn. These instructional goals were to be accompanied by an assessment system that would hold students, teachers, and administrators accountable for ensuring that these goals were achieved.

Advanced Systems in Measurement and Evaluation (ASME), with headquarters in Vermont, was awarded the contract to create the assessment system that would be called the Kentucky Instructional Results Information system (KIRIS). The accountability system they created is supposed to differ from the systems found in other states in four ways.

- The focus of accountability was not to be on students, but instead was to be placed on teachers, schools, and school administrators.
- The conventional, standardized, multiple-choice item format was to be replaced by performance tests.
- The accountability system was to be closely aligned with the National Assessment for Educational Progress (NAEP) assessment program.
- The accountability system was intended to have very high stakes for teachers and school administrators. For successful schools and

> teachers there were to be cash bonuses, for the unsuccessful, public humiliation and perhaps the loss of jobs.

Performance assessment can be an effective instructional tool for some course content and it can provide useful feedback to teachers about the direction their instruction should take. However, the use of performance assessments in high stakes environments is inconsistent with the instructional principles that underlie these assessment techniques. The use of performance assessments has been consistently rejected in the literature on performance assessment. Despite claims to the contrary in documents produced by KDE, Kentucky does not have a performance-based assessment system. What Kentucky has adopted is a non-multiple-choice assessment system. The two are not the same. There is a long measurement tradition which rejects the use of essay (what KDE has dubbed constructed response items) in large scale, high stakes assessments.

The reliability and validity of the KIRIS assessment is very much in question. Although the KDE reports high reliability, these results have been disputed. The inappropriateness of the methods employed by the KDE in computing their reliability quotients were pointed out in my presentation at the AERA convention and in a report contracted by the Kentucky Institute for Educational Research with the Evaluation Center at Western Michigan University in Kalamazoo Michigan.

The KIRIS assessment also lacks content validity because the KDE denies any connection between the

Academic Expectations and the Transitional Test section of KIRIS.

/s/ George K. Cunningham
Dr. George K. Cunningham

Subscribed and sworn before me by Dr. George K. Cunningham, Ph.D. this ___ day of April, 1995.

/s/ James F. Dinwiddie
NOTARY PUBLIC:
KY State at Large
MY COMMISSION EXP: 10-7-98

## FEDERAL REGULATION

34 CFR 98.4(C)(1) Psychiatric or psychological examination or test means a method of obtaining information, including a group activity, that is not directly related to academic instruction and that is designed to elicit information about attitudes, habits, traits, opinions, beliefs or feelings; and (2) Psychiatric or psychological treatment means an activity involving the planned, systematic use of methods or techniques that are not directly related to academic instruction and that is designed to affect behavioral, emotional, or attitudinal characteristics of an individual or group.

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## STATE STATUTES

KRS 13A.130(1) An administrative body shall not by internal policy, memorandum, or other form of action; (a) modify a statute or administrative regulation; [or] (b) expand upon or limit a statute or administrative regulation. . . . (2) Any administrative body memorandum, internal policy, or other form of action violative of this section or the spirit thereof is null, void and unenforceable.

* * *

KRS 156.160(1)(c) . . . Kentucky Board of Education shall promulgate administrative regulations establishing standards which school districts shall meet in student . . . performance. . . . Administrative Regulations shall be

promulgated for the following: . . . (c) the minimum requirements for high school graduation.

* * *

KRS 158.140(1) When a pupil in any public elementary school . . . completes the prescribed elementary program of studies, he is entitled to a certificate of completion signed by the teacher or teachers under whom the program was completed. . . . (2) Upon successful completion of all state and local board requirements, the student shall receive a diploma indicating graduation from high school.

* * *

KRS 158.6453 The State Board for Elementary and Secondary Education shall be responsible for creating and implementing a statewide, primary performance-based assessment program to ensure school accountability for student achievement of the goals set forth in KRS 158.645.

* * *

KRS 160.290(2) . . . . The rules, regulations and by-laws made by a board of education shall be consistent with the general school laws of the state. . . .

---

KENTUCKY ADMINISTRATIVE REGULATION

704 KAR 3:305 § 1. All students in the common schools and all students in the private or parochial schools which are accredited by the State Boards for

Elementary Education shall meet the following minimum credit requirements for high school graduation:

(1)(a) Language – 4;
(b) Social Studies – 2 (including one (1) credit in U.S. History).
(c) Mathematics – 3;
(d) Science – 2;
(e) Health – 1/2;
(f) Physical education – 1/2;
(2)(a) Required education – 1/2;
(b) elective – 8;
(c) Total – 20.

* * *

§ 3. (1) Each student who satisfactorily completes the requirements of this regulation and such credits and additional requirements as may be imposed by a local board of education shall be awarded a graduation diploma. . . . (2) Local boards of education may grant different diplomas to those students who complete credits above the minimum of credits as established by the State Board for Elementary and Secondary Education.

---

SCHOOL BOARD POLICY

Livingston County Board of Education Minutes of Meeting February 14, 1994: "Addition to Graduation Requirements, Board Policy 8.113 and promotion and retention requirements, Board Policy 8.22: Students shall complete all parts of KIRIS assessment before advancing to the next

grade or graduating, including acceptable math and writing portfolios."

Supreme Court, U.S.
FILED
DEC 14 1998
CLERK

No. 98-760

In The

# Supreme Court of the United States

October Term, 1998

CHAD TRIPLETT, TRACEY TRIPLETT and GWEN TRIPLETT O'BRIEN,

*Petitioners,*

v.

LIVINGSTON COUNTY BOARD OF EDUCATION, LEE JONES, MIKE JOINER, TONY LASHER, DARRELL STAFFORD, PHILLIP THRELKELD, AND TOM COUNTS,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Court of Appeals Of Kentucky**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Does the Petition state sufficient reasons to cause this Court to exercise its discretion under Supreme Court Rule 10 to assume jurisdiction to review the August 15, 1997[1] Opinion of the Court of Appeals of Kentucky?[2]

The primary question of law in this case is whether or not the Livingston County Board of Education had authority to develop, adopt and enforce a Board policy which required students to complete all portions of the KIRIS[3] assessment program as a portion of the regular curriculum before advancing to the next grade or graduate.

---

[1] This Opinion was initially rendered August 15, 1997, but was not "Final" until June 12, 1998.

[2] Respondents believe that Petitioners have erroneously titled their Petition both on its cover page and on Page 1 therein. The Supreme Court of Kentucky by a June 10, 1998 – "Order Denying Discretionary Review" – denied Petitioners' requested discretionary review and did not address the merits of this case. The Court which last addressed the merits of this case is the Court of Appeals of Kentucky which issued its Opinion August 15, 1997. Thus, the Petition should more correctly be titled and referred to as – "On Petition For A Writ Of Certiorari To The Court Of Appeals of Kentucky".

[3] The acronym "KIRIS" refers to the Kentucky Instructional Results Information System.

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## OPINIONS BELOW

The August 15, 1997 Opinion of the Court of Appeals of Kentucky is reported at 967 S.W.2d 25, see Appendix 1 – 22 of the Petition.

The October 10, 1997 Order of the Court of Appeals of Kentucky denying Petitioners' Petition For Rehearing was unreported, but appears at Appendix 48 of the Petition.

The Findings Of Fact, Conclusions of Law, Order and Judgment of the Livingston Circuit Court entered February 22, 1996, and its Supplemental Orders dated March 13, 1996 and April 9, 1996 are unreported and appear at Appendix 23 – 47 of the Petition.

The Order of the Supreme Court of Kentucky denying discretionary review dated June 10, 1998 is unreported but appears as Appendix 49 of the Petition.

## STATEMENT OF THE CASE

Pursuant to the Kentucky Education Reform Act ("KERA"), effective July 13, 1990, the Kentucky State Department of Education was mandated by the Kentucky General Assembly to develop a system of public education whereby State government, local communities, parents, students and school employees would share the responsibility of improving public education in Kentucky. Specifically, under *KRS 158.648*, seven areas are singled out as necessary to a proper education. *KRS 158.6451* lists six goals for the schools of the Commonwealth in terms

of the outcomes expected of students. *KRS 158.6453* mandates to the State Department of Education that a testing program be created and implemented "to ensure school accountability for student achievement of the goals set forth in *KRS 158.645*". The State Department of Education is responsible for administering a state-wide testing program to assess student skills in reading, mathematics, writing, science and social studies. Students in grades four, eight and twelve are to be tested. The test score results are then used to establish a baseline for determining school success. *KRS 158.6455* sets forth the criteria for rewarding "successful schools" and penalizing unsuccessful schools and the administrators directing those schools. *703 KAR 4:010*[4] was promulgated pursuant to *KRS 158.6455* and established the formula for determining a successful school.

*703 KAR 4:010* requires a certain amount of growth for each school, each year. *703 KAR 4:020*, Section 2(1)(b) states:

> "Each local district Board of Education shall adopt and implement by September 1, 1992, a continuous student assessment program designed to monitor student progress toward attaining the valued outcomes as defined by the State Board. The continuous assessment program shall include but not be limited to at least one of the following assessment strategies: performance tasks, portfolios, open-ended questions, and multiple choice questions".

---

[4] The acronym "KAR" refers to Kentucky Administrative Regulation.

The General Assembly mandated by statute that the Kentucky State Department of Education establish testing as a means of improving public education in Kentucky. The State Department of Education then promulgated regulations requiring local school districts to give their grades 4, 8 and 12 the KIRIS Standardized Assessment Test to measure academic performance of those students and evaluate school success.

On January 10, 1994, the Livingston County Board of Education held the first reading of the proposed policy which would require students in Livingston County in grades 4, 8 and 12 to take the KIRIS Assessment Test in order to be promoted to the next grade. The Policy was passed on February 16, 1994. Parents, students and church officials were present at both of the above referenced meetings and therefore, both the parents and students had notice of the new Board policy prior to the actual testing. The students in Grade 12 were tested February 21, 1994 through March 4, 1994. The students in Grade 8 were tested April 18, 1994 through April 29, 1994.

A four page document which is the Livingston County Board Policy which is in issue in this case appears at Pages 59 – 62, ROA.[5] This Policy requires that students complete all parts of the KIRIS assessment as a part of the regular school district curriculum. This Policy was developed, composed and adopted by the Livingston County Board of Education pursuant to the mandate of the Kentucky Department of Education in accordance with the

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[5] ROA is an acronym for the Record On Appeal in the appeal to the Court of Appeals of Kentucky.

1991-92 School Accountability Report, see Pages 63 – 74, ROA.

On December 6, 1993, prior to the Board's passage of the Policy on February 14, 1994, Appellant, Gwen Triplett, the mother of Chad and Tracey Triplett, executed and delivered to the Livingston County Middle School and Livingston County High School, written documents requesting that KIRIS assessment tests not be given to Chad and Tracey Triplett, see Pages 77 – 78, ROA. Consequently, both Chad and Tracey Triplett refused to take the KIRIS test when administered in their particular schools and ultimately, at the end of the school year, were determined not to have completed their required respective school curriculums, and they did not advance to the next grade level, i.e.: Tracey Triplett was retained in the 8th grade and not promoted; and, Chad Triplett was not granted his high school diploma as he was considered not to have completed the requirements of his high school education at Livingston Central High School. This action occurred despite an April 15, 1994 letter to Mr. and Mrs. Philip Triplett from Dr. Dean Wilson, Principal of Livingston County Middle School, which gave full notice to the Triplett parents that if their two children did not participate in the KIRIS Assessment Program, they would not be considered to have completed their class curriculum and promotion to the next grade level would not occur, see Page 79, ROA.

By letter dated February 28, 1994, (see Page 80, ROA) Ann Smith, Counselor at Livingston Central High School, confirmed that Chad Triplett (and presumably Tracey Triplett as well) could participate in make-up KIRIS testing during the time period from February 28 through

March 4, 1994, if Chad changed his mind about taking the test, with his mother's approval. This did not occur and the two Triplett children did not ever during the 1993-94 school year complete the required KIRIS testing program.

Prior to the testing, Mrs. Gwen R. Triplett requested a review the KIRIS Assessment Test. She was allowed to view sample questions from the test as an actual copy of the test was not yet available to the Livingston County School System at the time of the request. Mr. and Mrs. Triplett asked to review the sample questions in order to make a determination of whether the test appeared to discriminate on the basis of religion, infringe upon their parental rights, invade the family's privacy or infringe upon the childrens' freedom of speech. Mrs. Triplett also met with Superintendent Jones, Mr. Jack Monroe, Instructional Director of the Livingston County School System and Principal Tom Counts. Mrs. Triplett was given the option to have her children not answer the test questions she or they believed were objectionable.

On March 8, 1994, Superintendent Jones contacted the State Department of Education to discuss the School System's concerns about parental resistance to the KIRIS testing. C. Scott Trimble, Director of the Division of Accountability for the Kentucky State Department of Education, sent a letter dated March 8, 1994, in response to Superintendent Jones' concerns, see Pages 83 – 84, ROA. Mr. Trimble stated that while the State Department "did not intend to require participation, the Department will hold schools accountable for the performance of 'all' students and in the absence of KIRIS assessment information about the performance of a child, the school will be assigned a novice level performance for that child". The

letter confirmed that the State Department took the position that *KRS 150.6455 requires* that the school accountability system must be inclusive of *all* students. Mr. Trimble also made reference to the tight security needed on the actual tests and possibility that requests to obtain copies of the test from the State Department may be denied. Mr. Trimble admitted that tension would develop locally as students would not be required to take the KIRIS Assessment, but local schools would be held accountable for the students even if they did not take the test. In other words, the student would not be required to take the test in contradiction to the State Department's position that "The school accountability component of KERA does not recognize any exemptions to the accountability process". The State Department intended to assign each student who did not take the test a failing (Novice = O) score on the test and hold the school accountable for that score as if it had failed to properly educate that child according to the goals listed in KRS 158.6451. The State Department took a tough position on school accountability, but was unwilling to give the school support by taking a more definite position on whether each student was "required" by law to take the KIRIS Assessment Test.

Dr. Dean Wilson, Principal of Livingston County Middle School, by letter dated April 15, 1994, informed Mr. and Mrs. Triplett that their daughter would not be required to participate in the KIRIS Assessment, but according to Livingston County Board Policy, she would not be promoted to the 9th Grade. When the KIRIS Assessment Test was administered, neither Chad Triplett or Tracey Triplett participated in the testing. Ann Smith,

Guidance Counselor at Livingston Central High School, wrote a letter dated February 28, 1994, stating that Chad could take the test with his mother's approval, see Page 80, ROA. The letter noted the makeup test dates. On May 24, 1994, the Triplett family was given yet another opportunity to take the KIRIS assessment and was given notice by letter that Tracey would not be permitted to advance to the 9th Grade and Chad would not graduate as a result of their not participating in the KIRIS Assessment and in compliance with the Livingston County Board of Education's policy on retention and promotion, if the tests were not taken.

In both the February 28, 1994 and May 24, 1994, letters, Mrs. Triplett was notified that unless the children took the test, Tracey would not be promoted to the 9th Grade and Chad would not graduate. The Tripletts were notified of the policies prior to the testing, given the opportunity to review the only available sample test questions, and informed of possible makeup dates. The Livingston County Board acted at all times pursuant to KERA, the relevant regulations and under the direction of the Kentucky State Department of Education.

The Livingston Circuit Trial Court found in favor of the Respondents. The Court of Appeals of Kentucky upheld the Livingston Circuit Court Judgment on all issues related to the authority of the Livingston County School Officials to require the Triplett students to participate in the KIRIS testing or suffer the established penalties adopted and widely published by the Livingston County Board of Education. The Supreme Court of Kentucky refused to review the Court of Appeals Opinion and now Petitioners are asking the Supreme Court of the

United States to exercise its discretion and assume certiorari jurisdiction. The Petition now pending before this Court must fail for all of the reasons hereinafter more specifically set forth.

## REASONS FOR DENYING THE PETITION

### I. THE PETITION FAILS TO STATE ANY COMPELLING REASON FOR THIS COURT TO ASSUME JURISDICTION TO GRANT A REVIEW BY CERTIORARI IN THIS ACTION.

#### A. The Petition fails to sufficiently state any of the Supreme Court Rule 10 "Considerations Governing Review On Certiorari" characteristically compelling Review On Certiorari" characteristically considered by this Court as reasons for granting a Writ of Certiorari.

There is no specific reference in the Petition:

1. that states that a United States Court of Appeals has entered a decision in conflict with a decision of another United States Court of Appeals on the same important subject matter present in this case;

2. that states that a United States Court of Appeals has decided an important federal question in a way that conflicts with the August 15, 1997 Opinion of the Court of Appeals of Kentucky.

3. that states that a United States Court of Appeals has so far departed in a particular decision from the accepted and usual course of judicial proceedings that it is necessary

for this Court to accept certiorari jurisdiction;

4. that states that a United States Court of Appeals has sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory powers;

5. that states that the August 15, 1997 Opinion of the Court of Appeals of Kentucky represents a decision on an important federal question in a way that conflicts with the decision of another state Court of last resort or a U.S. Court of Appeals;

6. that states that the August 15, 1997 Opinion of the Court of Appeals of Kentucky or a United States Court of Appeals decision represents a decision on an important question of federal law that has not been, but should be, settled by this Court;

7. that states that the August 15, 1997 Opinion of the Court of Appeals of Kentucky or a United States Court of Appeals decision represents a decision on an important federal question in a way that conflicts with relevant decisions of this Court.

Thus, the Petition fails to state any of the usual reasons this Court often considers as compelling reasons for it to assume certiorari jurisdiction in a case of this nature.

**B. The Petition Is Framed More In The Form Of An Appeal Than A Proper Request For Review.**

The Petition is simply a set of rambling arguments that have been earlier presented both to the Livingston Circuit Court and the Court of Appeals of Kentucky in proceedings before those Courts. Nothing new is asserted

in the Petition that was not otherwise addressed in the other proceedings. It appears that the Petition is simply another effort to appeal a decision adverse to the Petitioners, but otherwise factually correct and irreversible.

## II. FEDERAL AND KENTUCKY LAW ARE CLEAR THAT THE LIVINGSTON COUNTY BOARD OF EDUCATION HAD FULL AUTHORITY TO DEVELOP, ADOPT AND ENFORCE THE BOARD POLICY OF FEBRUARY 14, 1994.

*KRS 159.010* requires school attendance for students ages 6 – 18. This requirement may be met through attendance at a private school or home school as an alternative to public school attendance. If a parent chooses to enroll his or her child in a public school for the purpose of complying with *KRS 159.010*, compliance with certain requirements becomes applicable. For example, the General Assembly has mandated a state-wide assessment program in *KRS 158.6433* and *158.6455*. Every public school system in Kentucky is responsible for full participation in this testing program. This assessment process is seen as a part of the curriculum and the learning process of students. It is a program which includes open-ended and multiple choice questions, writing portfolios and performance events for individuals and groups. This is all designed to help students acquire knowledge and skills recognized as important for public school education by the State Legislature in *KRS 158.6451* and by the Kentucky Supreme Court in the case of *Rose v. Council For Better Education, Inc.*, Ky., 790 S.W.2d 186 (1989). *KRS 158.545* contains portions of the "mandated" legislation.

The Department of Education and the Kentucky State Board for Elementary and Secondary Education hold all schools accountable for the performance of all students and in the absence of KIRIS assessment information about the performance of a child, the school will be assessed a novice level performance for that child. This is consistent with the way in which schools are held accountable for the performance of any child that is assessed for any reasons, since *KRS 158.6455* requires that the School Accountability System must be inclusive of all students. If a parent requests exemption of a child from the KIRIS assessment, it is equivalent to requesting an exemption from significant portions of the curriculum offered.

The law provides local school districts with broad authority over the instructional process and content. For example, *KRS 160.290* provides each local board of education with the general control and management of the public schools in its district, including providing for the authority to adopt rules and policies it deems necessary for the promotion of education in the district. This broad grant of authority gives the local board of education authority to require participation in the assessment process as a graduation requirement or for successful completion of a grade to enable a promotion to the next grade level. State Board for Elementary and Secondary Education regulation *704 KAR 3:305* also provides the local board of education with authority to add to the maximum high school graduation requirements established by that regulation.

For the schools which have adopted school-based decision making, school councils have authority, pursuant to *KRS 160.345(2)(j)*, to determine curriculum policies. The school council's policy could include a requirement that all teachers at the school require participation in the assessment process as a part of the curriculum. Additionally, *KRS 160.345(3)* provides that the policy adopted by the local board of education to implement school-based decision making is to address assessment of individual student progress, including testing and reporting of student progress to students, parents, the school district, the community, and the state. See *KRS 160.345(3)(b)*.

Other legal authority that can be cited includes *OAG 75.603*, in which the Attorney General concluded that boards of education under their general powers may establish reasonable policies and standards for the retention, demotion, and promotion of pupils. Additionally, it is concluded in *OAG 76.225* that the state's interest in establishing a sound curriculum format for graduation must prevail over requests to make patchwork exceptions to course requirements.

As to United States constitutional standards which are applicable to mandated curriculum, including assessment within the public schools, *Steirer by Steirer v. Bethlehem Area School District*, 987 F.2d 989 (3rd Cir., 1993); *Smith v. Board of School Commissioners of Mobile County*, 827 F.2d 684 (11th Cir., 1987); and *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir., 1987), *cert den.*, 108 S.Ct. 1029, 98 L.Ed. 2nd 993 (1988) apply to the issues in this Triplett case. These cases make clear the broad discretion public schools have in determining

appropriate curriculum. There is no constitutional provision that would entitle one to opt-out merely because one feels that a particular curriculum or assessment is bad educational policy or a waste of time. Two of the cases involve objections by parents based upon particular religious beliefs. These cases review the public school curriculum on the basis of the United States Constitution First Amendment's Establishment Clause and Free Exercise Clause. These cases conclude that there is no constitutional violation, in part because mere exposure to information as a part of the curriculum does not force one to abandon one's religious beliefs. Additionally, the United States Supreme Court has noted that "states and local school boards are generally afforded considerable discretion in operating public schools and has discouraged judicial intervention in the day-to-day operation of public schools," *Edwards v. Aquillar*, 482 U.S. 578, 583, 107 S.Ct. 2573, 2577, 96 L.Ed. 2nd 510 (1987). As the Supreme Court stated:

> "By and large, public education in our nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate constitutional values." *Epperson v. Arkansas*, 939 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed. 2nd 228 (1968).

In summary, the law (including federal and state law) does not give each parent the right to condition his or her child's attendance at public school or participation in any particular activity, including the KIRIS assessment, upon prior approval of the instructional content or teaching technique used, and the law does not give each parent the

right to have his or her child opt-out of any particular testing.

## III. THE TRIPLETT FAMILY WAS GIVEN EVERY POSSIBLE ACCOMMODATION THAT WOULD HAVE ALLOWED CHAD AND TRACEY TRIPLETT FULL OPPORTUNITY TO PARTICIPATE AND COMPLETE THE REQUIRED KIRIS TEST WITHOUT INFRINGEMENT UPON ANY OF THEIR VALUABLE PERSONAL AND CONSTITUTIONAL RIGHTS.

There is present in the record of this case, both at the trial level and in the Record on Appeal, a set of Affidavits of local Livingston County School Officials (see Record on Appeal, Pages 179 – 258).

These Affidavits show *explicitly* that Mrs. Gwen Triplett, with a friend, was allowed on at least two occasions to fully review the actual KIRIS test forms for the test that would be given to her two children in the Spring of 1994 in the Livingston County Schools they attended. In fact, Mrs. Triplett was allowed even to actually *choose* the KIRIS test form she would permit to be given to her children. Additionally, Mrs. Triplett was allowed the opportunity to personally strike or delete from the test documents her children would use, any questions or comments upon the test forms that she found objectionable to her family. Further, her children were allowed the privilege and discretion while taking the test to *skip* any question or portions of the test they desired so that in no

way would the rights, privileges and beliefs of the Triplett family be abused or compromised in their participation in this mandatory KIRIS testing process in Livingston County.

*The Petitioners admit* (Page 3 of their Response served May 1, 1995), see Page 106, ROA, that *Mrs. Triplett was allowed to see and examine all of the test on February 16 and 18, 1994*, prior to her childrens' scheduled testing dates. In addition, the two Triplett children were given multiple dates and occasions upon which they could make-up the test they chose originally to not take so that they could have every opportunity to advance to the next grade level and in Chad's case, graduate and receive a diploma from the Livingston Central High School.

In this regard, this Court is respectfully referred to the following specific sections of the six Livingston County School Board employee Affidavits, see generally Pages 214 – 258, ROA, and specifically therein as follows:

1. The Affidavit of Principal Tom Counts – Paragraph 17, Pages 7 – 8; Paragraph 20, Pages 8 – 9; Paragraph 29, Page 12, see Pages 219-233, ROA.

2. The Affidavit of Assessment Coordinator, Jack Lynn Monroe – Paragraph 4, Page 2; Paragraph 5, Page 2; Paragraphs 7, 8, 9, 10, 11, 12, 13 and 14, at Pages 2 – 3 – 4; Paragraphs 23, 24, 25, 28, 30 and 32 on Pages 6 – 9, see Pages 234 – 242, ROA.

3. The Affidavit of Barbara H. Vick – Paragraphs 4, 5, 7, 8, 10, and 12, Pages 2, 3, 4 and 5, see Pages 243 – 250, ROA.

4. The Affidavit of Doris Cothron – Paragraphs 6 and 8, Pages 2 and 3, see Pages 251 – 253, ROA.

5. The Affidavit of Mary Ann Smith – Paragraphs 3, 4, and 10, Pages 1, 2 and 4, see Pages 254 – 258, ROA.

6. The Affidavit of Superintendent Lee Jones – Paragraph 2, Pages 1 – 2, see Pages 214, 128, ROA.

Without a doubt, the entire Triplett family was given every possible accommodation to allow the two Triplett children to participate in the mandatory assessment program. In view of the accommodations given to the Triplett family, it is impossible to understand why the Triplett parents insisted upon refusing to allow their children to participate in a testing program that they themselves would have had the opportunity to pre-approve for content. It seems obvious to the Respondent Defendants herein that the Triplett parents were attempting to attack somehow the entire KERA Legislation, with the only means they had available to them, i.e.: a refusal to allow their children to participate in a testing program that they themselves had been given permission to purify and sterilize in advance of its administration.

As further evidence of this position, should the Court look at the three Affidavits filed with Petitioners' May 1, 1995, Response (see Pages 117 – 121, ROA), it is easy to see that the attack these persons are making upon the KIRIS test has more to do with the form of the test documents rather than the content of the documents and manner in which they are administered by the School Officials. Surely, given the opportunities of sterilization

that were made available to the Triplett family prior to the Triplett children taking the test, it is very difficult, if not impossible, to understand what could have been the reason then remaining for the Triplett parents to demand that their children not be assessed for their *ACADEMIC ACHIEVEMENT* which is what the KIRIS test does according to the two Affidavits of Dr. Reidy and Dr. Kingston.

## IV. THE ADOPTION OF THE POLICY BY THE LIVINGSTON COUNTY SCHOOL BOARD IN FEBRUARY, 1994, WAS NOT AN UNREASONABLE MID-YEAR CURRICULUM REQUIREMENT.

The taking of the required Assessment tests required no advance preparation beyond that required of a student in his/her normal academic class program. No advance study was needed. There were no advance materials to review. There was no set score to be met and the Triplett children were given every opportunity to "opt-out" on any section they found objectionable.

The KIRIS test thus required no advance preparation, no score to be achieved and in fact did not even require what has now been referred to as a "good faith effort" by the student which is a requirement in other public school systems here in the State of Kentucky with regard to this KIRIS testing program. The two Triplett children apparently, based upon the statewide administration of this KIRIS testing program, had the best scenario possible in that they were given every conceivable accommodation in any fashion they desired so long as they simply participated in all portions of the taking of the test.

## V. THE LIVINGSTON COUNTY SCHOOL SYSTEM WAS CORRECT IN REQUIRING PARTICIPATION OF ALL STUDENTS IN THE KIRIS ASSESSMENT PROGRAM.

As referred to by Dr. Edward F. Reidy in Paragraph 15, at Page 5, of his Affidavit, Page 202, ROA.

> "The Kentucky law requires us to expect a high level of achievement from all students. The law does not allow us to define "all". It says "all" students. Therefore, the only way we can do that is to assess all the students."

In addition, since the KIRIS tests measure only the academic performance of students, see Paragraph 10, Page 3, of Dr. Reidy's Affidavit (see Page 200, ROA) the tests are a measure of progress being made by students and would have identified for the Triplett family the strengths and weaknesses of their children in their major academic subject areas of math, reading, science, social studies and writing. All of this, due to the objections of the Triplett parents, has been denied as a public service to the two Triplett children offered by the Public School Systems of the Commonwealth of Kentucky.

In addition, as a method of sanitizing and sterilizing these KIRIS tests in advance of their administration, the Court will please take notice of the incredibly important statements in Dr. Reidy's Affidavit, at Paragraphs 20, 21 and 22 at Pages 6 and 7 thereof (see Pages 203 – 204, ROA) when Dr. Reidy refers to the work of the *Content Advisory Committee, the Bias Review Committee and the Sensitivity Committee* of the Kentucky Department of Education. More specifically, the Court will note that in advance of the administration of any test in Kentucky, the

members of these three screening committees created a method of insuring that the content of the test for the students is appropriate according to a wide-range of personal views held by citizens and educators in the State of Kentucky. In addition, the tests are critically reviewed by the Bias Review Committee to see if there is any evidence of any bias being placed within the test documents before they are administered.

The Sensitivity Committee Members review the test to be sure that there are no political or religious viewpoints promoted or even remotely addressed in an offensive fashion which might tend to discriminate against or make uncomfortable the persons who are taking the tests as students. As a further service to the parents and citizens of this State, there have been developed what are called "Alert Papers" which detail the manner in which Kentucky teachers may report any student behavior which might indicate that the student is a danger to himself or others. As we all know, it is not uncommon for students to refrain from advising their parents of their personal emotional battles and these tests could serve as a method for the students expressing themselves in written essay form which if not reported to the parents and/or appropriate authorities, might result in that student harming himself/herself or others. How anyone could possibly object to the use of "Alert Papers" is beyond recognition by these Respondents.

Finally, although Kentucky is the first State to use tests which implement an Accountability Program on a statewide basis for schools, it is not the first state to administer assessment tests such as KIRIS tests. As Dr. Reidy and Dr. Kingston clearly established, these essay-

type KIRIS tests have been commonly used for many years by testing authorities and experts throughout the nation as these essay tests in fact effectively measure pure academic achievement, or lack thereof. Since *accountability* is one of the goals of KERA, through the system of test score "equating", the Kentucky Department of Education has developed a method of accounting for academic achievement within *all* schools of this state, by *all* students in every single school district. This is the mission given by the Kentucky Supreme Court, if you will, in the landmark case of *Rose v. Council For Better Education, Inc.*, (Ky.) 790 S.W.2d 186 (1989), when the Court said as follows:

> " . . . We have directed the General Assembly to recreate and redesign a new system that will comply with the standards we have set out. Such a system will guarantee to *all children* the opportunity for an adequate education, through a state system." (See Page 212) (emphasis added);
>
> "An efficient system of education must have as its goal to provide *each and every child* with at least the seven following capacities. (emphasis added):
>
> (1) Sufficient oral and written communication skills . . . ;
>
> (2) Sufficient knowledge of economic, social and political systems to enable the student to make informed choices;
>
> (3) Sufficient understanding of governmental processes to enable a student to understand the issues that affect his or her community, state, and nation;

(4) Sufficient self-knowledge and knowledge of his or her mental and physical wellness;

(5) Sufficient grounding in the arts to enable such student to appreciate his or her cultural and historical heritage;

(6) Sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

(7) Sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market." (Page 212).

"We view this decision as an opportunity for the General Assembly to launch the Commonwealth into a new era of educational opportunity which will ensure a strong economic cultural and political future". (See Page 216).

## VI. RESPONDENTS' PERCEIVED MISSTATEMENTS OF FACT OR LAW IN THE PETITION.

The Respondents advise this Court that the following references in the Petition are perceived by them at this time to be misstatements of fact and/or law:

1. Page 9 – the reference to Chad and Tracey being harassed and intimidated by school officials is strongly denied.

2. Page 19 – the reference that the trial court held that educational experts were of no use in this case is denied.

3. Page 21 – the reference that the State of Kentucky participated in a "ploy" in focusing on self-evaluation of the schools as compared to the students is denied.

4. Page 21 – the reference to teachers "teaching to the test" is denied as a part of the normal teaching process in the school.

5. Page 21 – the reference to the arbitrariness of the grading is denied as well as the argument that the KIRIS testing program was unproven, novel, based upon false propaganda and on its face in violation of 20 U.S.C.A. § 3401(3).

6. Page 25 – the reference to the argument that Kentucky Courts have ignored the United States Constitution and the laws of our Congress, especially FERPA, is strongly denied.

7. Page 25 – the reference arguing that the August 15, 1997 Opinion of the Court of Appeals of Kentucky is in conflict with relevant decisions of this Court regarding education and families (although no decisions are cited), is denied; and, it is denied that "for the sake of the nation's economic future, this educational experiment invites review and correction".

8. Finally, any argument or reference in the Petition that the August 15, 1997 Opinion of the Court of Appeals of Kentucky is contrary to any statute, federal or state, is denied.

## CONCLUSION

The Petition is nothing more than an attempt at a further appeal. Review by certiorari is not a matter of right, but of judicial discretion and granted only when there are compelling reasons.[6] There are no compelling reasons cited in the Petition. There is no specific reference to any federal or state statute or court decision which is in direct conflict with the final decision rendered by the Opinion of the Court of Appeals of Kentucky of August 15, 1997. There is no unique reason cited in the Petition that would cause this Court to assume jurisdiction in this action. The Supreme Court of Kentucky refused to review the Opinion now sought to be reviewed in this Court by the Petitioners. Every subject touched upon by the Petitioners in their pending Petition was addressed by them both at the trial in Livingston Circuit Court, and in the appeal to the Court of Appeals of Kentucky. Quite simply put, there is no sufficient cause or reason for the Supreme Court of the United States to assume jurisdiction by certiorari and thereby grant a further review of this action.

For the reasons hereinabove stated, the Court is requested to deny the Petition For A Writ Of Certiorari now pending before this Court.

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[6] *Wright, Miller & Cooper; Federal Practice and Procedure;* Jurisdiction 2d Section 4004.1 at Pages 24, 25.

Respectfully submitted, this the 14th day of December, 1998.

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